IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.	*No.* 213.
THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.	*No.* 214.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

We do not deem it necessary to trouble the Court with more than one brief on our part in the above-entitled causes, at least so far as the motions to dismiss and

affirm are concerned. While there are two records on file, and hence, perhaps, the defendant in error was compelled to make two motions, there is substantially but one case, and cause No. 214 is so dependent upon the decision that may be rendered in case No. 213 that they may well be considered together. The two records simply present two phases of the same case. An action was commenced by the defendant in error in the Circuit Court of the United States, for the District of Montana, on the 19th day of September, 1893 (Printed Record No. 213, p. 6, No. 214, p. 6), to recover a judgment against the plaintiff in error for the sum of $200,000 for wrongfully, unlawfully, and wilfully entering upon one of the veins, lodes, or ledges having its top or apex within the surface location of the St. Louis quartz lode mining claim, and mining, extracting, and taking therefrom large quantities of valuable ore and converting the same to its own use.

The cause was not tried upon the original complaint, but upon a *second amended and supplemental complaint*, filed June 26, 1899 (Record, p. 1). To this second amended and supplemental complaint, the plaintiff in error, defendant in the Court below, filed its answer (Record, p. 7), and thereafter and on the 8th day of August, 1899, the cause came on for trial to the Court and a jury (Record, p. 16). The trial resulted in a verdict in favor of the plaintiff, defendant in error herein, for the sum of $23,209.00 (Record, p. 14), upon which verdict a judgment was subsequently, and on the 16th day of August, 1899, duly entered in said Circuit Court, for said sum, together with costs of action (Record, p. 15).

The defendant, the Montana Mining Company, Limited, being dissatisfied with the judgment, on the 28th day of August, 1899, tendered to the Court a bill of exceptions

(Record 213, p. 16) which was duly allowed, signed and filed. The plaintiff, the St. Louis Company, claiming also to be dissatisfied with the rulings of the Court rejecting certain testimony offered by it, on the same date presented and had allowed a bill of exceptions on its behalf (Record No. 214, p. 16).

Upon the bill of exceptions taken by this plaintiff in error a writ of error was promptly sued out and the citation served October 9, 1899 (Record No. 213, p. 60). The case was argued and submitted to the Circuit Court of Appeals in the month of January, 1900, and thereafter and on the 14th of May, 1900, the Circuit Court of Appeals rendered its decision affirming the judgment rendered in the Circuit Court for the District of Montana (Record No. 213, p. 67). The judgment so rendered thereupon became final, and upon receipt of the mandate from the Circuit Court of Appeals the plaintiff would have been entitled immediately to an execution to enforce it.

On the bill of exceptions which was settled and allowed on behalf of the plaintiff in the case, no action was taken until the 29th day of January, 1900, when its counsel proceeded to file their assignment of errors, and sue out a writ of error (Record No. 214), and the record did not reach the Circuit Court of Appeals at San Francisco until the 26th day of February, 1900 (Record No. 214, p. 49), which was some time after cause No. 213 had been argued and submitted to the Circuit Court of Appeals, but before the decision had been rendered therein.

The cause was thereupon again heard in the Circuit Court of Appeals upon the record contained in No. 214, and the Court, while it did not grant the relief prayed for by the plaintiff in error therein, which was that the "judgment " of the Circuit Court for the District of Montana, be re- " versed and that the said Circuit Court be directed to en-

" ter an order setting aside the verdict and *dismissing the* " *said cause of action*," it did, on the 8th day of October, 1900, without disturbing the judgment which had been theretofore rendered in said cause in case No. 213, make an order that the case be remanded to the Circuit Court for a new trial as to damages alleged, and recovery sought, for conversion of ores between what was designated as the 108-foot and the 133-foot planes (Record No. 214, p. 52). It will be seen by the diagram made by the Court, in its statement of the case (Record No. 214, p. 50), that the apex of the Drumlummon vein, which was the vein in controversy, entered the St Louis claim at a point in its easterly boundary, 520 feet southerly from its northeast corner marked " D," and after traversing a portion of the easterly side of said claim, passes out of the same easterly side line, as shown in the diagram, and returns again into the Nine-Hour claim. It may be that the Court has not correctly shown in its diagram the course of the apex of the vein through the St. Louis ground, or the exact angle made by the vein with the easterly side line of the claim, in its departure therefrom, but this is in a measure immaterial. It is sufficiently accurate to illustrate the contention of the parties. On the trial, the plaintiff, in its proof of damages, had been restricted to ore which had been mined in the Nine-Hour claim at points north of what is designated as its 108-foot plane, which was a projected line drawn downward parallel to what it claimed to be the south end line of its claim. But it further claimed the right to prove damages for ores taken from the Nine-Hour claim up to the point designated as its 133-foot plane, which is the point where it is claimed in the complaint that the foot wall of the vein passes out of the St. Louis ground and into the Nine Hour. In this conten-

tion, as already stated, they were sustained by the Circuit Court of Appeals, and a new trial ordered to ascertain what, if any, ore had been removed from the vein by the defendant between the 108-foot plane and the 133-foot plane. No retrial of any other issue was permissible under the opinion rendered. The verdict of the jury and the judgment of the Circuit Court rendered thereon on the 16th day of August, 1899, and the order of the Circuit Court of Appeals affirming such judgment, were to stand without qualification or modification in any way or manner whatever. If there had been a new trial of this single issue resulting in another jury finding additional damages in favor of the plaintiff, it must have resulted in an additional judgment, and we would have had the anomalous condition of two *final judgments in one action*, on what was presented by the complaint as a *single cause of action*. The judgment already entered could not, for obvious reasons, have been amended so as to include the additional amount which might be found by the new jury on the retrial of this issue.

There is no misunderstanding between counsel as to the condition in which the case was left by these two decisions in the Circuit Court of Appeals. In case No. 213, they attack our writ of error, because they say that the jurisdiction depended entirely upon the diverse citizenship of the parties, and it was not "one in which any "Federal question whatsoever was involved." It is not made a ground of the motion, nor is it contended anywhere in the argument filed in support of the motion, that there is not a final judgment in the case, which would support a writ of error to this Court, if the case were otherwise a proper one for that relief. Such a contention would be futile, and it is not made.

On the other hand in No. 214, the first ground of their motion is—

"1. Because no judgment has been rendered in *this* " case against the plaintiff in error, but the action of the " Circuit Court of Appeals was simply to grant a new " trial *upon certain issues* and no review can be had in " this Court until final judgment has been rendered."

A perusal of the two motions made and now under consideration, must clearly show that there is no disagreement between the distinguished counsel who appear in support of these motions and ourselves, with reference to the scope and effect of the decisions rendered in this case by the Honorable the Circuit Court of Appeals. In case No. 213 there is a valid subsisting final judgment, and it is past all assault or attack from any quarter, unless it be in the Supreme Court of the United States. In case No. 214, on the special issue directed to be tried by the Circuit Court of Appeals, there has been no final judgment.

And if case No. 214 were in truth and in fact a case, and not merely a dismembered fragment of a case, we would frankly admit that we were not entitled to a writ of error in it, and that it ought to be dismissed on the first ground urged in the motion. But it is not in any sense a case or action at law, such as is contemplated by the statutes and the rules of this court forbidding the issuance of a writ of error until there is a final judgment. As already suggested, it is only a dismembered fragment of a case, in which there is a final judgment conceded by counsel to be sufficient in all respects to support our writ of error, if there is a Federal question presented by the record. This dismemberment happened, as we have already seen, through the inexcusable negligence and

delay of the gentlemen on the other side, in failing to sue out their writ of error until the cause had been heard in the Circuit Court of Appeals on our writ of error. If notice had been given us of their intention to sue out a writ of error, it is possible that we might have delayed the hearing on our own writ of error until such time as the case could be heard on both at the same time. Where there are cross appeals of this character, it is manifest that both sides should be heard at the same time, so as to prevent the case from getting into the condition which is presented by the record, and it is possible that the Circuit Court of Appeals, if it had had timely notice of the second writ of error, would have sent our writ of error to the foot of the docket, to await the perfecting of the record on the second appeal; but having heard our appeal and having divided the case, they refused to reunite it again, as they might well have done. We sought by means of a petition for a rehearing to get the two cases reunited, but were unable to do so (see dissenting opinion of Judge Ross, Record No. 214, p. 54).

We were therefore confronted with this situation: Here was a final judgment for a large sum of money, which judgment we believed to be unjust, and which also involved the loss to us of a very valuable portion of our Nine-Hour claim. There was no possible relief from it except by appeal through a writ of error or *certiorari* to this Honorable Tribunal; at the same time here was this fragment of the case, for, at the utmost, not to exceed twenty-five feet, which was not included in the judgment. It presents in and of itself a Federal question, as we shall undertake later to show, of absolutely first impression, and one of great importance. In the exploration and development of quartz lode mining claims, it is a matter of frequent occurrence that a lead is found to enter or pass

out of a mining claim through a side line, instead of what the locator has designated as his end lines, and sometimes this departure, as in the case at bar, is found to be at a very acute angle. Where a lead is found crossing an end line of a claim, and departing through a side line it is now settled law that the extra lateral rights of such vein are governed by the end line crossed, and a projected line parallel to such end line drawn down through the point of the departure of the vein through the side line.

Del Monte Mining Co. v. *Last Chance Mining Co.*, 171 *U. S.* 55.

But, where the lead does not cross the side line at a right angle, through what point is this projected line to be drawn down? Is it through the point where the hanging wall passes through the line, as held by the Trial Court in this case; or is it where the foot wall of the vein passes through such line, as held by the Circuit Court of Appeals; or is it to be drawn midway; or at some other point between the two extremes? We need scarcely urge the importance of this question and the necessity for its speedy determination, regard being had to the interests of those engaged in the highly necessary but hazardous business of mining for the precious metals. Where a lead is in truth a wide one, as this one mentioned in the case at bar is claimed to be, every foot of it, yes, every lineal inch of it, may be worth many thousands of dollars. Considering the importance of this question and the frequency with which it must arise, it seems surprising that it has not already been definitely settled by this Court, and that there are not decisions of it to be found in the courts of last resort of the mining States and Territories and of the several Circuit Courts of Appeal sitting in those States.

If there is any authoritative decision upon this question other than the one made in the case at bar, it is not cited in the opinion of Judge Morrow, and we have diligently sought through many books to find one, but our quest has been in vain. This case is here upon a judgment, which, as we have seen, the counsel on the other side concede to be sufficient to support our writ of error. This important question, though contained in a separate record, is a material part of the same case. Its consideration, to some extent at least, will be necessarily involved in the determination of the main case. Here and here only can the question be finally and definitely settled. It is fairly presented in the record. Why should the motion of the gentlemen on the other side prevail?

There is one thing further we desire to say before taking leave of this branch of the case, and that is, that whatever action this Court may feel itself constrained to take upon these motions, it will take such action and make such orders as will tend to reunite the dismembered fragments of this case. We respectfully submit that if the decisions of the Honorable the Circuit Court of Appeals are to stand, it must result in two final judgments in this action, an anomalous proposition fraught with many dangers, and one which should not be engrafted upon our jurisprudence.

A Federal Question.

Turning now to the consideration of the main case, we shall confine ourselves to the single issue presented by this motion. Is there a Federal question disclosed in this record in such manner as to give this Court jurisdiction, or is it a case where the jurisdiction of the Federal Courts is dependent entirely upon the diverse citizenship

of the parties, and the decision of the Circuit Court of Appeals is final? We think that we may safely rely upon the proposition that this is the only question which this Court will be called upon to consider in passing upon this motion. The eminence in their profession of the gentlemen whose names are found subscribed to this motion is a sufficient guaranty that there is nothing else in the case worthy of consideration except the issue they tender us.

However, before proceeding to the discussion of this question, it may be well to set these gentlemen right on an error or two they seem to have fallen into. On page 7 of their brief they say:

"The jurisdiction of the United States Court was origi-
" nally obtained solely by reason of the allegation that
" the plaintiff was a citizen of the State, and the defend-
" ant an alien."

We think it is safe to say that the jurisdiction of the Federal Courts was originally invoked by reason of the Federal questions appearing on the face of their complaint, and did not rest at all upon the diverse citizenship of the parties to the action. The complaint appearing in the Record, page 1, is the second amended complaint, and there are, therefore, two complaints, the original and the amended complaint, which are not in the record. The summons, however, does appear in the Record, page 5, and is sufficient for our purposes. By the summons it appears that the action as originally brought was not only against the plaintiff in error, but also against Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Hawkins, one and all citizens of Marysville and of the State of Montana. All of these defendants were found and served

with summons at said town of Marysville. (See Marshal's return, p. 6.) The summons and return are a part of the record.

Gordon v. *Third National Bank*, 144 *U. S.* 97.

The return showing that these personal defendants were found and served at Marysville, Montana, raises the legal presumption that they were citizens of the State wherein they were found, which is the same State of which it is alleged the plaintiff was a citizen.

Jentzen v. *Arizona Copper Co.*, 20 *Pac.* 33.
Minneapolis v. *Ream*, 12 *U. S. App.* 446.
Vatt, Law of Nations, p. 101.
State v. *Blackeno*, 6 *Black* (*Ind.*) 488.
Gordon v. *Third Nat'l Bank*, *supra.*

" A controversy between citizens of different States is " one in which every party upon one side is a citizen of " a different State from every party upon the other."

1 *Foster's Federal Practice, p.* 37, *Sec.* 18.
Blake v. *McKim*, 103 *U. S.* 336.
Removal Cases, 100 *U. S.* 457.
Hyde v. *Ruble*, 104 *U. S.* 409.
Corbin v. *Van Brunt*, 105 *U. S.* 578.
Fraser v. *Jennison*, 106 *U. S.* 194.
Stone v. *South Carolina*, 117 *U. S.* 433.

From these authorities it is apparent that whatever may have been the ground upon which this plaintiff originally invoked the jurisdiction of the Federal Court, diversity of citizenship was not one of them, and jurisdiction was not "dependent entirely upon the opposite " parties to the suit or controversy being aliens, or citi- " zens of the United States, or citizens of different States."

Another error made by the gentlemen is found on page 13 of their brief. They say:

"It is by the petition in error, page 68, folio 133, "that the plaintiff in error first attempts to raise these "Federal questions. It is there that we first hear that "the Court erred in holding that a vein (folio 133 'C') "which enters and departs through the same side line of "a claim has or can have extra-lateral rights under the "laws of the United States."

We think the gentlemen's hearing must be slightly impaired.

The Federal question presented on the face of the complaint was raised at the outset of the trial (No. 213, Record 16, folio 32).

"After the said jury had been duly empanelled and "sworn to try the case, the defendant objected to the "introduction of any testimony on the part of the plain-"tiff for that the second amended supplemental com-"plaint, which had been theretofore read to the jury did "not state facts sufficient to constitute a cause of action "and did (*not ?*) state facts showing that the plaintiff "had no cause of action." The word "not" in italics is a mistake of the printer. The question of the extra-lateral rights attaching to plaintiff's alleged vein was here presented and argued to the Trial Court, and the objection was overruled and the defendant, now plaintiff in error, excepted. This exception was duly preserved in the assignment of errors attached to the petition for writ of error to the Circuit Court of Appeals, No. 213, Rec. p. 49, folio 96, Assignment No. 1, and herein preserved by petition in error, Rec. p. 68, folio 134, Assignment C.

May we not be permitted to express some surprise that the gentlemen did not "hear" of it until the filing of the petition referred to. In support of this assertion we beg to quote from our brief in the Circuit Court of Appeals, upon which the case was argued. At page 20 of that brief we say:

"The complaint shows that the plaintiff has no cause
" of action. The only vein mentioned in the complaint
" is one that enters and departs from the same line of the
" St. Louis claim. The only thing in the complaint from
" which even an inference may be drawn that there is
" another vein within the surface boundaries of the loca-
" tion is found in the fourth paragraph (Printed Record, 6)
" where it is alleged 'that the dip of *one* of the veins hav-
" 'ing a portion of its top or apex,' etc."

From this allegation the barest inference might arise that there was some other vein within the surface boundaries of the St. Louis claim, but in the absence of any direct allegation we are entitled to treat this as being too vague and indefinite to mean anything. At all events, it is upon the presence of this vein within the surface boundaries of the claim, for a part of its distance, that plaintiff bases its right to recover in this action, and having pleaded no other we are entitled to regard this one as being the only lead or vein within the surface boundaries of the St. Louis claim. The paragraph of the complaint to which we have just called attention clearly shows the point at which the hanging wall of the vein enters the St. Louis claim and the point of its departure therefrom, and it is through the same boundary line. The same line cannot serve for both end lines of a mining claim, and if it could the right to follow the lead on its dip would be cut off when the line was reached. Parallel end lines are essential to the existence of extra-lateral rights.

Montana Co. v. *Clark*, 42 *Fed.* 628.
Iron, etc., Min. Co. v. *Elgin Min. Co.*, 118 *U. S.* 196.
Tyler Min. Co. v. *Sweeney*, 5 *Fed.* 284.

Mr. Lindley in his excellent work on mines disposes of this question in a single sentence. He says:

"It seems hardly necessary to discuss the question of "extra-lateral rights as applied to a case where the vein "enters and departs through the same side line."
2 *Lindley on Mines, Sec.* 584.

And he cites with the highest approval the case of *Catron* v. *Old*, 23 *Col.* 433; 48 *Pac.* 687, in which case Chief Justice Hayt in a well-considered opinion very fully sustains this view. The case of *Catron* v. *Old* in its essential features is very like the case at bar. By reference to the diagram which will be found both in the report and in the reference to the case in *Lindley*, it will readily be seen that the south side line of the Fulton lode has about the same angle in it, which is found in the easterly side line of the St. Louis claim, and the apex of the lead passes through the line in each case in about the same way. The difference between the two cases is, that in the former case it was the located lode which was denied extra-lateral right while in the case at bar extra-lateral rights are claimed for a lode accidentally within the surface boundaries of the St. Louis claim. Under the complaint, as it stood when the case went to trial, we think it showed that the plaintiff was not entitled to assert any extra-lateral rights on so much of the apex of the Drum Lummon lode as was found inside the surface boundaries of its claim.

In response to this, the counsel for the defendant in error here, who also represented it before the Circuit Court of Appeals, say in their brief filed in that Court, p. 17:

"The cases cited by the counsel effectually dispose of "the objection to the effect that the vein in question "enters and departs through the same side line. In the "first place it was not alleged to be the discovery vein.

"It was alleged that plaintiff was the 'owner' of it. The "argument as to the sufficiency of that has already been "made. It must be assumed that we are the owner in "some proper manner, the fact being alleged. Being a "by or ancillary vein we had the right to recover upon "it to the entire extent that we had the right to recover "upon the original vein."

In view of these indisputable facts, might we not be pardoned if we expressed some friendly solicitude about the memory of the gentlemen on the other side, as well as about their sense of hearing?

The counsel also fall into another error, when they say, on the same page of their brief, in speaking of this matter of the existence of a Federal question and the time when it was first brought to their attention:

"It is only as the plaintiff in error heard of it inciden- "tally through the dissenting opinion of one of the "Circuit Court judges that it is first raised and now sug- "gested in the way of a petition."

We think we might be permitted to rise to a point of order here. This is an insidious attack upon our reason and perceptive faculties. An attorney who could not see a proposition so clearly averred in the complaint as this one is, would scarcely be able to see the Washington Monument from Pennsylvania avenue. But there is not a word said in the dissenting opinion of Judge Ross (Record in No. 214, p. 54) as to whether there is or is not a Federal question presented in the record in the case. He speaks of the importance of the question and the failure of the Court in its opinion reported in 102 Fed. Rep. 430, to advert to it at all, and expresses the opinion that a rehearing should be granted upon our petition therefor, and that the case together with the one then in hearing

(No. 214) should be set down for reargument, to the end that the question as to whether any extra-lateral rights exist in respect to any vein that enters and departs from a side line only, may be discussed by counsel and fully considered by the Court before final determination. While the question that Judge Ross is talking about is not designated as a Federal question, every lawyer knows that as to whether a vein such as he describes has or has not extra-lateral rights depends entirely upon the proper construction to be put upon the Mineral Laws of the United States, and that no final and definite decision of the question can be made except in the Supreme Court of the United States. It is almost needless to add that if this suggestion of Judge Ross had been heeded we would not have been compelled to trouble Your Honors with these grave questions, with the record in the dismembered and mutilated condition in which we are now obliged to present it.

The Main Issue.

Having seen that jurisdiction of this case did not arise originally from the fact that the plaintiff was a corporation organized under the laws of the State of Montana, and that the defendant was a corporation organized under the laws of Great Britain; that there was a question in it, which we claimed at least arose under a statute of the United States, and hence was a Federal question and that it was not sedulously concealed by us from the gentlemen on the other side and wickedly sprung on them when they had neither time nor opportunity to meet it, we may now proceed to the consideration of the one vital issue. We do not claim, of course, that we have adverted to and sought to set the gentlemen right on all of the errors they have

fallen into in their brief. For example, on page 13, and throughout the entire brief for that matter, they seem to be laboring under the hallucination that we ought to have pleaded this Federal question in our answer. It is a familiar rule of pleading that a general denial puts in issue every single allegation in the complaint, which is well pleaded. They distinctly and unmistakably alleged in their complaint the right to pursue extra-laterally and into our ground a lode, the apex of which, according to their own allegations, entered and departed from the same line of their St. Louis claim. We just as distinctly and unmistakably denied that right, and here was the issue clean cut and well defined. To have labeled this in our answer a "Federal" question would not have availed us anything. To constitute a Federal question, such as gives the Federal Court jurisdiction, it is well settled that it must appear on the face of the plaintiff's pleadings, and the defendant cannot import it into the case by setting it up in his answer.

We will contend that there are three distinct Federal questions presented on the face of this record:

1. Has a vein, the apex of which enters and departs through the same side line of a claim, extra-lateral rights which entitles the owner of the mining claim to pursue it in its downward course beyond such side line and into a mining claim adjoining?

2. Can a miner pursue a vein which passes out of the side line of his claim at an acute angle to such line and follow it in its downward course into the mining claim adjoining, beyond the point where the whole of the apex of such vein is within the surface boundaries of his own claim?

3. On the trial of this case was full faith and credit given to the judgment rendered in the District Court of

the First Judicial District of the State of Montana, in the case wherein the plaintiff in error herein was the plaintiff and the defendant in error herein and another were defendants?

The first two questions appear distinctly on the face of the complaint. The third is first set up in the answer as an estoppel, and is again pleaded in the replication and the judgment roll is offered in evidence by the plaintiff on rebuttal (Record, pp. 32 to 44, both inclusive). The first two propositions seem to us so clearly to be Federal questions that we are almost ashamed to cite authorities in support of our contention. First, the statute:

"The Circuit Courts of the United States shall have "original cognizance concurrent with the courts of the "several States, of all suits of a civil nature, at common "law or in equity, where the matter in dispute exceeds, "exclusive of interests and costs, the sum or value of "two thousand dollars, and arising under the Constitution "or laws of the United States, or treaties made, etc."

Act of March, 1875, Rev. Stats. Sec. 629, Clause 1, as amended March 3, 1887, and corrected August 13, 1888, 25 U. S. Stats. 433.

Says Chief-Justice Waite in *Starin* v. *New York*, 115 U. S. 248:

"The character of a case is determined by the ques- "tions involved, *Osborne* v. *Bank of United States*, "9 Wheat. 824. If from the questions it appears that "some title, right, privilege or immunity, on which the "recovery depends, will be defeated by one construction "of the Constitution, or a law of the United States, or "sustained by the opposite construction, the case will be "one arising under the Constitution or laws of the United "States, within the meaning of that term as used in the "Act of 1875; otherwise not. Such is the effect of the "decisions on this subject, *Cohens* v. *Virginia*, 6 Wheat.

" 264, 379; *Osborne* v. *Bank of United States*, 9 Wheat.
" 737, 824; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Gold*
" *Washing, etc., Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennes-*
" *see* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mis-*
" *sissippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S.
" 449, 462; *Kansas Pacific* v. *Atchison Railroad*, 112
" U. S. 414, 416; *Provident Savings Co.* v. *Ford*, 114
" U. S. 635, 641; *Pacific Removal Cases*, 115 U. S. 1, 11."

What is the use of "fining pure gold." This concise, clear-cut, admirable definition of a Federal question has been cited approvingly in many cases, and has been thus cited by more than one member of this Court.

The case we present falls exactly within the lines of this definition. The plaintiff, in paragraph IV of its complaint, alleges (Record, p. 3):

" That the dip of one of the veins having a portion
" of its top or apex inside of the surface location and
" patented ground of the said St. Louis mining claim is
" to the east and dips under and beneath the said Nine-
" Hour lode mining claim, including the said thirty-foot
" or the compromise ground, which is a part and portion
" of the said Nine-Hour quartz lode mining claim, which
" said portion of said vein has its top or apex within the
" said St. Louis mining claim, as follows, to wit: Com-
" mencing at a projected parallel end line of said St. Louis
" quartz lode mining claim, at a point on the east side
" line thereof, between corners Nos. 1 and 2, extended
" vertically downward, whereat it passes through the hang-
" ing wall of said vein, lode, or ledge, at a point from
" which corner No. 1 being the northeast corner of said
" St. Louis quartz lode mining claim bears north 12 de-
" grees 15 minutes east, distant 520 feet, where said
" hanging wall is disclosed at the surface by an upraise of
" said projected parallel end line, 5 feet west of the east
" side line of said St. Louis quartz lode mining claim;
" thence from where the said projected parallel end line
" passes through said east side line of said claim and

" along the east side line of said claim, between corners " Nos. 1 and 2, south 21 degrees 15 minutes west 512.7 " feet, to a point being the intersection of the said east " side line of said St. Louis quartz lode mining claim, be- " tween corners Nos. 1 and 2, with the west line of the " thirty-foot strip hereinbefore described; thence south " 59 degrees 50 minutes west 108 feet, and along the west " line of the said thirty-foot strip to a projected parallel " end line of said St. Louis quartz lode mining claim, ex- " tended vertically downward, which passes through the " hanging wall of said vein at the surface and at the cross- " ing of the said hanging wall with the west line of the " said thirty-foot strip.

" That it is also the owner of, in possession, and enti- " tled to the possession of an additional portion of the " said apex of said vein lying to the south of the southern " point hereinbefore mentioned, a distance of 25 feet, " whereat the foot wall of the said vein passes out of the " east side line of the said St. Louis lode mining claim."

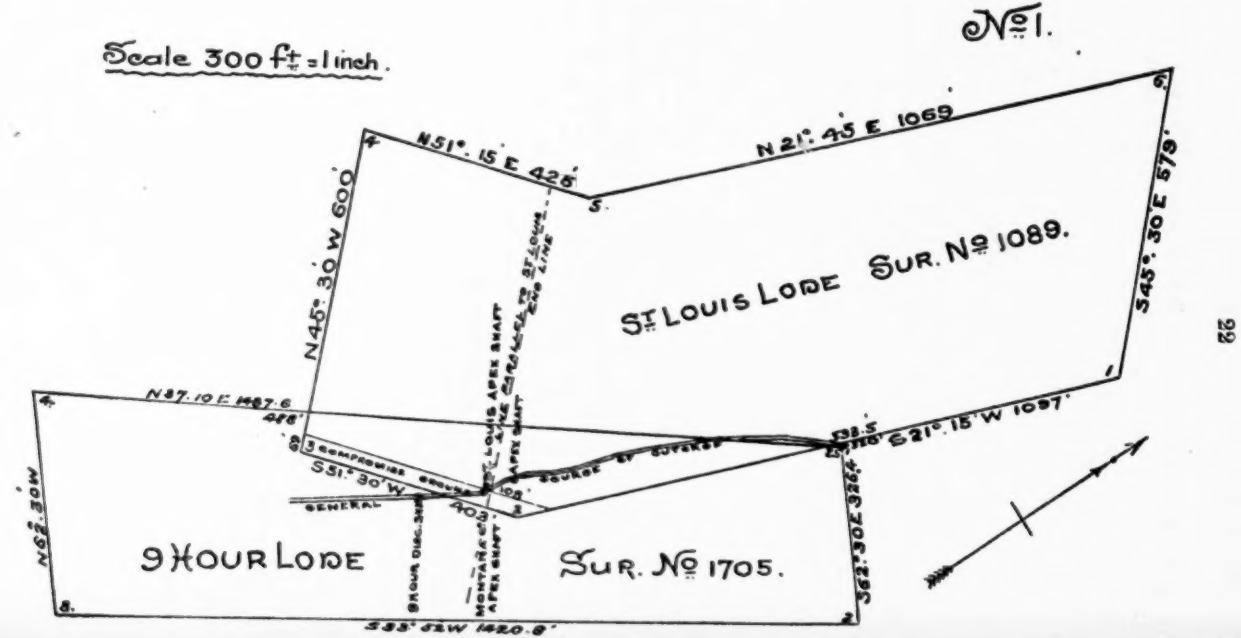
It is not alleged that this claim of extra-lateral right for this particular vein is made under the provisions of Section 2322, Rev. Stats., but that follows without saying. Our answer denies this, and the issue is clearly made and presented.

We present herewith a diagram showing the location of the two claims, so that the Court may more clearly understand the case than it could probably do from the skeleton map found in the opinion of the Circuit Court of Appeals and the one presented by counsel on the other side in their brief. In the complaint it will be observed that the plaintiff has unnecessarily and at great length set out the boundaries of its St. Louis claim. A comparison of the diagram with this allegation in the complaint will show that it is absolutely correct so far as the outline of the St. Louis claim is concerned, and while there is no such ready method of determining the correctness of the out-

line of the Nine-Hour claim, it is immaterial because it is alleged in the complaint that it adjoins the St. Louis claim on the east, and that the vein upon which it claims extra-lateral rights dips into it.

The question here presented is one of great importance, not only to the parties in this case, but to mining men generally. Lode mining claims are only found in rugged mountainous regions. The mountain sides are often much eroded by the elements. The prospector is obliged to make his location before he has had time to thoroughly explore the claim, and it is not an infrequent occurrence to find that the apex of a vein enters a claim through a side line and after traversing it for a greater or less distance, passes out again through the same line. The question as to what extra-lateral rights, if any, attach to such a vein is one of almost first impression. The only decided case thus far is that of *Catron* v. *Olds*, *supra*, where it was held that there could be no extra-lateral rights accorded such a vein. It is settled law that parallelism of the end lines of a claim are essential to the existence of this right, and that what are end lines and what are side lines of a mining claim is to be determined by what lines are crossed by the vein in its entry into and departure from such claim. In the case at bar we contend that in the absence of any allegation in the complaint that there is another lode within the surface boundaries of the St. Louis claim, there is nothing to show which of its lines are end lines or which are side lines, and that our case is exactly on all fours with that of *Catron* v. *Olds*.

There have been many cases involving this question, with the result that the decision by the United States Circuit Court of Montana, now standing approved by the United States Circuit Court of Appeals for the Ninth


No 1.
Scale 300 ft = 1 inch.
N51° 15' E 425'
N 21° 45' E 1069'
S45° 30' E 579'
N45° 30' W 600'
St LOUIS LODE SUR. No 1089.
St LOUIS APEX SHAFT
THE CONTACT OF St LOUIS 2nd LINE
APEX SHAFT
N87.10 E 1487.6
446'
S51° 30' W
SOUDOE ST. SURVEY
S 21° 15' W 1097'
GENERAL
N03°
9 HOUR LODE
SUR. No 1705.
N62° 30' W
S62° 30' E 326'
BROWN DISC. SHAFT
MONTANA CO. APEX SHAFT
S35° 52' W 1420.8'

Circuit, is in direct conflict with a long line of decisions in the United States Circuit Court for the District of Colorado, the earliest of which was the case of *Equator Lode* v. *Colorado Central Lode*, and, among the later, *Turck* v. *Colorado Central*, which, in various forms, is reported in 50 Fed. Rep. 888, 54 Fed. Rep. 262, and 150 U. S. 138, with the result that this question, of great practical importance in mining and in the determination of mining litigation, stands now with contradictory decisions between Courts in different jurisdictions, thus establishing that there is a substantial dispute as to the construction of the Federal statute which governs and determines this right, upon which Courts differ, and therefore is a question which should be determined by the final tribunal in such matters, the Supreme Court of the United States.

Mr. Morrison, in his Mining Rights, Tenth Ed., 1900, at page 135, states the controversy, in its present situation, as follows:

"In the controversy between the Equator Lode and the "Colorado Central Lode, in the U. S. Court at Denver, "the lode was admitted by both parties to be, at the point "of conflict, over 100 feet wide. Each claimed under a "patent conveying a surface of 50 feet, the Equator cov-"ering the southern portion of the apex and the Colo-"rado Central the northern. The Court held that in "such a case each party could hold only to its side line, "and divided the lode by extending the south side line "of the Colorado Central patent vertically downward "through the lode.

"In the case of Bullion Co. *v.* Eureka Co., 11 Pac. 515, "the Supreme Court of Utah were divided, two judges "holding that covering a part of the apex gave a right to "the dip, and the dissenting judge following Hall *v.* "Equator Co.

"All apex rights are a departure from the common law, "and should therefore be strictly construed. The hold-"ing in the Equator case, as far as we know, has been

" uniformly followed by the *nisi prius* Courts, and we " cannot doubt that it is a correct application of the stat- " ute to the subject-matter.

" The reasoning in the Stone Lode case, 15 M. R. 641, " and the Amy Silversmith case, 152 U. S. 222, all tend to " confirm this view, to wit: That the survey must cover " the whole width of the apex to entitle it to extra- " lateral rights."

For a fuller discussion of this question and the positions of the Courts upon it, emphasizing our contention that the Supreme Court must decide this vexed question, we cite *Lindley on Mines*, Vol. 2, Section 583.

WHERE A LODE DEPARTS THROUGH THE SIDE LINE OF A CLAIM, WHERE SHALL THE PROJECTED END LINE BE DRAWN DOWN?

We have already referred to this question briefly in what we had to say with reference to case 214. What we have just said with reference to a vein entering and passing out of the same side line of a mining claim being a Federal question applies with equal force to this question. Its solution depends entirely upon the construction to be put upon the provisions of Chapter Six of the Revised Statutes of the United States. Without citing the authorities let us assume as settled law the proposition so often decided by this and other courts, that the character of the boundary lines of a mining claim can only be determined by the strike of the discovered lode, and that whatever the locator may have designated it when he made his location, that only is an end line which is crossed by such lode—then why should greater extra-lateral rights be accorded to a lode when it passes out of the claim through what the locator has designated as a side line, than it would have if found departing through what he has called an end line? Let the following diagram illustrate this inquiry:

25

Scale 200 ft = 1 inch.
Cor. No. 1
N 51° 15' E 425 ft.
N 38° 30' W
APEX OF VEIN
St Louis
600 ft.
Cor. No. 2
S 51° 30' W 403 ft.
S 21° 15' W.

Let the foregoing figure represent the southerly end of the St. Louis claim as located by the plaintiff. The line B, C, is the southerly end line. The line 1, 2, represents the foot wall of a lode which passes out of the claim through the located end line. The line 3, 4, is the hanging wall, and the dip is shown by the dip arrow. In pursuing this lode on its dip there can be no controversy, under the provisions of the chapter referred to, that the miner would be obliged to stop when he reached a point vertically under the line B, C, until he had reached a point far enough easterly, so that in following the lode on its dip he would pass out of his own claim under the line A, B, if that is in truth, what plaintiff has called it, a side line of the St. Louis claim.

Of course, if the lead on its strike should be found to pass out of the line A, B, then that, too, under the decisions of this Court, would become an end line, and its extra-lateral rights would be cut off again by that line. The law seems clear upon this subject:

"But their right of possession to such outside parts of
"such veins or ledges shall be confined to such portions
"thereof as lie between vertical planes drawn downward
"as above described, through the end lines of their loca-
"tions, so continued in their own direction that such
"planes will intersect such exterior parts of such veins
"or ledges."

"And nothing in this section shall authorize the locator
"or possessor of a vein or lode, which extends in its
"downward course beyond the vertical lines of his claim
"to enter upon the surface of a claim owned or possessed
"by another."

U. S. Rev. Stats. Sec. 2322.

We respectfully submit that there is nothing in the statute which would give to a side line, which becomes an end line of a mining claim by reason of the fact that the lode on its strike crosses it, greater rights than would attach to an end line which the locator had designated as such, and which, in truth, is an end line. In either case it must be held to be an end line which cuts off all pursuit of the vein beyond it.

Another more serious and an insuperable objection to fixing the line at what the plaintiff calls its 133-foot plane is, that it gives the lead on its strike to the plaintiff beyond the end line of its claim, and does precisely what the clause just quoted from Sec. 2322 says shall not be done. In this connection we desire to direct the attention of the Court to the fact that at this point the pay ore in the Drum Lummon vein comes practically to the surface. The witness Keerl (Record, p. 19), says:

"Block No. 9 is the stope above the twenty-foot level, "lying north of the 108-foot plane and east of the west "line of the thirty-foot strip."

As a miner would phrase it, the Drum Lummon lode at this point is practically in ore from the "grass roots "down."

In order to better illustrate the position we are trying to urge upon the Court, let us have recourse to another diagram:

Let A, B, represent the projected imaginary line drawn down parallel to the south end line of the St. Louis claim, or running north 45 degrees 30 minutes west as drawn by the Circuit Court, and the line C, D, as the line drawn in the same direction by the Circuit Court of Appeals, but through the point of intersection of the hanging wall of the vein with the east side line of the St. Louis claim,

DRUMLUMMON
Louis
Compromise Ground
Cor. № 2
198 ft plane
133 ft plane
A.
D.
E.
N 45° 30' W.
N 45° 30' W
B.
C.
EAST SIDE LINE
APEX
Hour
Nine

and we have the triangle A, D, E, wholly within the surface of the Nine-Hour ground, and on the hanging wall side the vein has been taken on its strike from A to E beyond the end line of the St. Louis claim. It is unnecessary to argue to this Court that if any projected end line is to be drawn down through our mining claim the point of departure fixed by the Circuit Court was right and the one fixed by the Circuit Court of Appeals was clearly and palpably wrong. If the plaintiff in error here had taken a million dollars out of its Nine-Hour claim, between the points the defendant in error designates as its 108-foot and its 133-foot planes it could not be made to account for a dollar of it, even if its Nine-Hour claim was a mere unpatented location, and even if the defendant in error had not made it a deed conveying to it not only the surface of this compromise ground, but every penny's worth of mineral therein contained as well.

Still another reason why the Circuit Court of Appeals was in error on this question. The statute gives the locator of a mining claim "the exclusive right of possession and enjoyment of all the surface included within their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

U. S. Rev. Stats., Sec. 2322.

Mark this language: The "top" or "apex," not any part of the top or apex. The Circuit Court of Appeals reads into the statute by its decision "*any part of the top or apex.*" Recurring again to Figure 3, it will be readily seen that from the time the hanging wall crosses the east side line at A, until the foot wall passes through the same line at D, the St. Louis has only a part of the apex of the lode, which gradually grows less and less until it is en-

tirely cut off at D. Something is said in the opinion of the Circuit Court of Appeals about drawing the line midway between the walls and giving each side one-half. Under the statute this would have been error also, differing only in degree from the error the Court fell into when it said that the projected end line should have been drawn down at the point where the foot wall of the vein intersected the side line of the St. Louis claim.

There cannot possibly be two opinions among lawyers that the Circuit Court of Appeals was clearly and palpably wrong in its opinion rendered in case No. 214. No difference how munificent a recovery the plaintiff might be able to secure on the trial of this issue, this Court, beyond the preadventure of a doubt, would set it aside, and the Circuit Court of Appeals for the Ninth Circuit might possibly do so upon further and fuller argument and more mature deliberation. If this is so, then why should this poor little dismembered fragment, embraced in No. 214, be treated as if it were, in fact, a case within itself, and not merely as it is, in fact, a single question, though a very important one, in a case full of great questions. Why should we be remitted back to the Circuit Court for the District of Montana, to be compelled to work our way up here again with this question, backed with a final judgment of that Court and the Circuit Court of Appeals to the end that this Court may finally settle it? Would the question be presented one whit clearer than it is by the present record, or would either of the parties to this controversy be benefited a single farthing by the delay, loss, and expense that would be necessarily incurred in doing so? Is not the law as administered by this exalted tribunal the perfection of human reason?

A judgment ought to be an entirety. There is in this case but a single cause of action stated in the complaint,

and there ought not to be two judgments. An appellate court ought not to affirm an entire judgment in part and reverse it in part.

Langley v. *Grill*, 1 Col. 71.
Buris v. *Johnson*, 24 Ky. (1 *J. J. Marsh*) 196.
Story v. *N. Y. & H. R. Co.*, 6 N. Y. 85.
Goodsell v. *W. U. Tel. Co.*, 109 N. Y. 149.
Wolstenholm v. *Mfg. Co.*, 64 N. Y. 272.

WAS FULL OR ANY FAITH ACCORDED THE JUDGMENT PLEADED AND INTRODUCED IN EVIDENCE BY THE PLAINTIFF?

The judgment roll in the case referred to in the defendant's answer and specially set up in the replication of the plaintiff, appears in the Record, pp. 32 to 44. It is known as the "*Specific Performance Case*." It was brought upon a certain bond for a deed, made March 7, 1884, by Charles Mayger, who was the predecessor in interest of the St. Louis Company, to William Robinson *et al.*, who were our predecessors in interest in the Nine-Hour claim. It was an agreement to convey to our predecessors in interest upon the consideration therein named the "Compromise "Ground," together with all of the mineral therein contained, without any reservations or exceptions whatever. Charles Mayger, the grantor named in our bond, in violation of that instrument, on or about the 10th day of June, 1893, conveyed this strip of ground to the St. Louis Mining and Milling Company, who had full notice of our rights in the premises. This Company, the defendant in error here, refusing to make a conveyance to us, suit was brought in the First Judicial District Court of the State of Montana, to enforce the performance of the obligations con-

tained in said bond, and the findings of fact and the judgment rendered therein appear in the record at pages 40 to 44, both inclusive. The Court found as conclusions of law:

I.

"The plaintiff is entitled to a conveyance from the "said defendant of and for the premises particularly men- "tioned and described in the said bond known as the "'Compromise Ground.'"

II.

"That the said defendants and each of them should be "enjoined and perpetually restrained from asserting any "right, title, or interest of any kind or character in or to "the said compromise ground, or any part or portion "thereof, and from, in any manner, interfering with the "possession or enjoyment thereof by plaintiff."

The judgment orders a conveyance to be made to us describing the compromise ground by metes and bounds, together with all the mineral therein contained, and the deed, being in the form prescribed by the Court, appears on pages 10 and 11 of the Record.

An appeal was taken by the defendant in error, to the Supreme Court of the State of Montana, and the decision of that Court appears in 19 Mont. 313, 51 Pac. Rep. 824. From the judgment in the Supreme Court of Montana the case was brought to this Court on writ of error and was again affirmed, 171 U. S. 650.

The question as to whether full faith and credit or any faith and credit was given to this judgment in the trial of the case at bar, is a Federal question. The Constitution of the United States, Art. 1, Sec. 4, provides that,

"Full faith and credit shall be given in each State to "the public acts, records, and judicial proceedings of "every other State, and the Congress may, by general "laws, prescribe the manner in which such records shall "be proved and the effect thereof."

Sec. 905 of the Revised Statutes of the United States was passed to carry this Constitutional provision into effect. In it we find this provision:

"The said records and judicial proceedings so au- "thenticated shall have such faith and credit given to "them within every Court of the United States as they "have by law or usage in the Courts of the State from "which they are taken."

The judgment in the Specific Performance Case expressly directs, as we have already seen, the conveyance by metes and bounds to the plaintiff in error of the "Compromise Ground," *together with all the mineral therein contained*, without any exceptions or reservations whatever, and it expressly restrains and forever bars the said plaintiff in the Court below, from all interest or claim in or to the said premises, or to any part or portion thereof, or to the possession of the same or any portion thereof. The judgment of the Circuit Court and of the Circuit Court of Appeals denies all force or effect to this judgment, beyond compelling the execution of the deed, no claim being made that the said District Court of the State of Montana did not have jurisdiction of the subject matter, or of the parties to the action, or that the said judgment was void for any other reason whatever. As every pound of ore for which the plaintiff was claiming to recover, came out of this "Compromise Ground," one of the principal contentions, both in the Circuit Court and the Circuit Court of Appeals, was the force and effect to be given the judgment.

Under the constitutional provision and the statute already quoted, judgments rendered in a State Court are recognized as binding in the Federal Courts, and the same force and effect are to be given them as they would have in the Court wherein they were rendered.

In *Mills* v. *Duryea*, 7 Cranch, 481, which is said by Mr. Justice Miller, in *Green* v. *Van Buskirk*, 5 Wall. 309, 310, to be the leading case on this subject, it was claimed that the effect of this constitutional provision and of the statute was simply to make such judgment admissible in evidence, but did not declare the force or effect of such judgment when thus admitted in evidence. This contention was promptly overruled, and Mr. Justice Story declared,

"It remains only then to inquire in every case what is "the effect of a judgment in the State where it is ren- "dered."

The doctrine of this case has never been questioned. It is as sound law to-day as it was when it was first handed down.

McElmoyle v. *Cohen*, 13 Pet. 326.
Christmas v. *Russell*, 5 Wall. 302.
Green v. *Van Buskirk*, *Ibid* 310.
Crapo v. *Kelley*, 16 Wall. 637.
Hilton v. *Guyot*, 151 U. S. 182.
Mutual Life Ins. Co. v. *Harris*, 97 U. S. 336.
Dow v. *Johnson*, 100 U. S. 186.
Dillingham v. *Hawk*, 60 Fed. 498.
Chuan v. *Wilson*, 9 Wll. 123.
Thompson v. *Whitman*, 18 Wall. 457.
Hampton v. *McConnell*, 3 Wheat. 235.
D'Arcy v. *Ketchum*, 11 How. 175.
R.R. Co. v. *Wiggin's Ferry Co.*, 119 U. S. 622.
Alkire Gro. Co. v. *Richesin*, 91 Fed. 83, *et passim.*

We call special attention to the case last cited for the reason that it expressly holds the judgment of a State Court estops parties from raising a question thus decided in the Federal Court, judgment having been obtained in the same State in which the Federal Court sat.

Now irrespective of what was the character of the property; what was the situation of the parties; what were the issues in the action, are we not narrowed down to the simple and single inquiry, what was the judgment of the State District Court? And when we reach this inquiry is there any possibility of being mistaken in the answer? Does it admit of any possible doubt or uncertainty? Is it not that this defendant in error should convey to us by a good and sufficient deed of conveyance the "Compromise Ground," describing it by metes and bounds TOGETHER WITH ALL THE MINERAL THEREIN CONTAINED? It is not all the mineral therein contained save and except such as may be found in leads having their tops or apices within the surface boundaries of the St. Louis claim. The Circuit Court and the Circuit Court of Appeals read that into the judgment. It was not put in by the District Court of Montana and it was distinctly shown that it did not intend to put it in there by the judgment it rendered and the form of deed it prescribed for the conveyance of the property. The words "*together* "*with all the mineral therein contained,*" are expressly made a part of the description of the property to be and which is conveyed. Counsel for the defendant in error are vehement in declaring that in construing this judgment regard must be had to the character of the property to which it relates. To this we agree, but about the most important thing in a mining claim is the mineral therein contained. A strip of barren mountain side, thirty feet in width and four hundred feet in length is of no value

to us without the mineral therein. In other words, they insist on sucking the orange, and asking us to content ourselves with the rind. If the judgment is too broad; if it should have excepted from its operation such mineral as might be found in the Drum Lummon lode in the Compromise Ground, or mineral in any lode having the whole or any part of its apex within the surface of the St. Louis lode, then they should have seen to it that their rights were fully protected by inserting in the judgment apt and appropriate words for that purpose. If the judgment is broader than the contract upon which it is based; if in point of fact it embraced the entire St. Louis lode with all the mineral therein contained, it is now too late for them to object to it on that score. They must stand or fall upon the plain, unmistakable language of the judgment as it is written, for behind this judgment is the constitutional guaranty and the Act of Congress we have cited above.

On such an absolutely plain and simple proposition it seems like imposing on this Court to do more than barely state it; and yet we have had, as we think, such undeservedly bad luck in getting either of the lower Courts to see this proposition as we see it, we feel as if your Honors will pardon us for going a little further into the question. The deed was not a voluntary one. It was only executed after a long and hotly contested trial and in pursuance of the order of the Court prescribing both its form and contents. We are, therefore, relieved of all inquiry as to the intention of the parties in making it. This is the question that the Circuit Court of Appeals, in our judgment, goes wrong on. What was the intent of the parties making the bond for a deed upon which the Specific Performance case was brought, was an issue in that case, was fought out to a finish, and under the authorities above

cited cannot now be re-examined either in the Circuit Court or the Circuit Court of Appeals, or in any other judicial tribunal.

The defendant, in its answer filed in that case (Record p. 37), denies that we are the owners of the Compromise Ground, or the mineral therein, and aver that the same was at all of the times mentioned in our complaint a part of the St. Louis lode mining claim. It denies that their predecessors in interest had wrongfully or otherwise, at the time of the survey of the St. Louis lode for patent, extended the easterly boundary line of the said St. Louis lode mining claim over the Nine Hour, and it avers that the boundary lines of the St. Louis claim as surveyed, was as the same were originally located and embraced the "Compromise Ground," and every part thereof before the location of the Nine-Hour claim; and it is further averred that the defendant is in possession, and entitled to the possession of the same and every part thereof, save and except a small strip occupied by sufferance by the plaintiff as an ore house. It is admitted that after application for patent for the St. Louis claim had been made Robinson and others filed an adverse claim upon which suit was subsequently brought. That in settlement of this controversy Charles Mayger, their predecessor in interest, executed the bond sued on, but they aver "that the said adverse "claim aforesaid was interposed for the purpose of harrassing and delaying said Mayger from obtaining a patent "to said St. Louis mining claim, and that the said bond was "executed as a compromise to avoid the same; all of which "was done contrary to equity and good conscience and for "the sole purpose aforesaid." If every one of the issues presented by this answer was true, and this judgment were the most unjust and inequitable ever rendered by a judicial tribunal, it is now forever too late to question it. As

already said, an appeal was taken to the Supreme Court of the State of Montana, where the issues were carefully re-examined and the judgment affirmed. A writ of error was then sued out from this Court and the case carried to the Supreme Court of the United States. We did not see that any Federal question was involved, and therefore made a motion to dismiss the writ of error and affirm the judgment. The plaintiff in error claimed that the contract made by the original bond was contrary to the policy of the law, and thus necessarily raised a Federal question. Without determining whether this was or was not a Federal question sufficient to sustain the writ, you, in effect, held the affirmative by proceeding to carefully re-examine the issues and affirm the judgment (171 U. S. 650). We say, therefore, that the judgment is as absolutely unassailable as though it had been graven on one of the tablets of stone brought down by Moses from the burning Sinai. The intent with which the bond was made, the property that it conveyed, and every issue that was raised or might have been raised under the pleadings in that case, are settled and forever set at rest by the judgment rendered therein.

In determining what are the rights of the parties in this case we have only to keep our eyes steadily fixed on the judgment in the Specific Performance Case and we cannot go wrong. Has the plaintiff the right to the mineral found in the Compromise Ground, in a lead that has its apex or a part of its apex in the St. Louis claim west of the west boundary line of the Compromise Ground, which is claimed to be the east side line of the St. Louis? No! Because that was an issue in the Specific Performance Case, settled and forever set at rest by the judgment therein. May plaintiff enter on the surface of the Compromise Ground and take the triangular portion thereof

shown in figure No. 3? No! The judgment bars him and he is forever enjoined in any court or place from even claiming the right to do so.

"Together with *all*." Can there be any possible doubt of the import of this language so as to require the Court, or justify the Court in so construing it as to give it any other meaning than that commonly understood? Charles Mayger, at the time he made the bond, had the right to convey the whole of the St. Louis claim, or a part of it. He could convey the surface to one grantee and the mineral to another; he could convey the surface or the mineral separately or jointly as he saw fit. This has long been settled. Messrs. Barringer and Adams, in their excellent work on mines, say:

"Though minerals undisturbed, or in place, are a part
"of the freehold, and as such usually belong to the owner
"of the soil, they are capable of separate ownership and
"distinct possession. Where there is such a severance
"of estates, the minerals are real estate constituting a
"separate corporeal hereditament, capable of distinct in-
"heritance and conveyance. There may be further sep-
"aration of the different strata, or of minerals of different
"kinds, each of which may have a different owner and
"constitute a distinct estate in land. Moreover, the grant
"of the permanent or absolute interest in the minerals
"effects such a severance and is equivalent to a convey-
"ance in fee of the estate in the minerals separate from
"that of the owner of the soil."

Barringer & Adams, Law of Mines, p. 35.

The District Court of Montana found that the plaintiff's predecessor in interest contracted with our predecessors in interest that if they would dismiss their suit in Court and withdraw their adverse claim in the United States local Land Office he would execute to them a deed for the "Compromise Ground," with all of the mineral contents

therein, without regard to where the apex of the lode might be in which such mineral was found, and in the same conveyance he was to convey to them every right, title, or interest which he might have either legally or equitably in and to said piece of ground and everything therein contained. This is the judgment of the Court as clearly expressed as the English language is capable of expressing human ideas. Shall full faith and credit be given this judgment, or shall it be said this language does not mean all, but only means such mineral as may be found therein in leads whose apices are found within the surface boundaries of the Compromise Ground? Would this judgment have been one whit more clear if it had directed the conveyance of the Compromise Ground to us with every right to which the grantor was entitled under the terms and provisions of the Act of Congress of May 10, 1872, and any and every other Act of Congress relating to the disposition of the public domain?

The words "together with" in connection with a previously-mentioned subject in a deed or power operate to enlarge and not to restrain that which was previously granted.

Winter v. *Loveden*, 1 Lord Raymond, 267.
Cardigan v. *Armitage*, 2 Barn & Cres. 197.

The words "together with" are equivalent to the word "also," which means "likewise," "in like manner," "in addition to," and denotes that something is added to that which precedes it.

Panton v. *Tafft*, 22 Ill. 166.

If the deed in question had simply conveyed the premises without expressly conveying the mineral; if it had been entirely silent on this subject, we would still

have been entitled to all of the mineral which is accorded to us by the Circuit Court and the Circuit Court of Appeals. Both of these Courts refuse to give any significance whatever to the words "together with all the minerals therein contained," though found in the description of the property conveyed, and in the judgment of the Court ordering such conveyance.

ESTOPPEL BY DEED.

Suppose the deed made in this case were not a part of the judgment of the Court, and that it was simply a conveyance of the Compromise Ground without any reference whatever to the mineral therein contained. What then would have been the respective rights of the parties? It cannot be doubted that we would have been entitled to all mineral found in veins having their tops or apices within the surface boundaries of the ground thus conveyed. But how would it have been with the defendant in error? Would it have been entitled in the absence of any reservation of extra-lateral rights in its deed to have followed into the ground thus conveyed such portion of the vein as had its apex within the surface boundaries of the St. Louis claim?

"The general rule of the common law was that who-
" ever had the fee of the soil, owned all beneath the sur-
" face."

Del Monte Mining Co. v. *Last Chance M. Co.*, 171 U. S. 55, 60.

The rule is that whatever is in derrogation of the common law, is to be strictly construed, and the decisions both State and Federal clearly recognize this rule.

Morrison's Mining Rights, p. 112.

The doctrine of extra-lateral rights is clearly in contravention of the common law. There is nothing in the statute giving the right of lateral pursuit any of the qualities of a covenant running with the land, or making it inalienable except in express terms. It would seem to follow that unless this right was preserved in the deed by fit and appropriate words of exception from the grant, everything contained in the land would pass by the deed and the grantor would be estopped from thereafter asserting this right as against his grantee. The Government of the United States occupies no different plane, when it comes to dealing with its real estate, than does any other owner of that species of property. When it comes to make a conveyance, *i. e.*, a patent of a mining claim, it does two things with reference to extra-lateral rights. First, it conveys to its grantee the right to pursue the vein found within the surface boundaries of the claim in its downward course, though it passes under the vertical side lines of his claim and into the premises adjoining; and secondly, in express language it excepts from the grant made, and reserves to an adjoining owner the right of extra-lateral pursuit. If the reservation is necessary in a patent in order to give an adjoining owner this right, then it is equally necessary in a deed, and a grantor not reserving it would be thereafter estopped by his deed from asserting it against his grantor. The decisions upon this question are scanty, but so far as they go they seem to support our contention.

In the case of *Stinchfield* v. *Gillis*, 107 Cal. 86; 40 Pac. 98, the Court says:

"The effect of the deed from Gillis to plaintiff was to "estop him and those claiming under him from ques- "tioning the title of the plaintiff to all the gold that

" might be found in the west vein, within the surface line " of his deed. The gold in controversy was found within " the surface lines of this deed, and it was also found " within the limits of the two walls forming the west " vein, although the place at which it was found is also " within the lines of the walls which form the Rice vein. " This latter circumstance does not, however, relieve " Gillis from the estoppel of his deed, for, as the deed " contains no reservations, and as there was no evidence " at the trial of any mining customs, effect must be given " to the deed according to its terms by holding that the " entire west vein within the surface lines, even though " intersected by another, passed to the plaintiff."

The facts in this case are found in the opinion of the Court on a former appeal, 96 Cal. 400; 30 Pac. 839. On and prior to January 17, 1886, Gillis was the owner of the "Carrington" claim. On that day he sold to Stinchfield a portion of his claim known as the Pine Tree Mine, conveying the same to him by a simple bargain and sale deed. At this time one Rice was working on a portion of the Carrington claim not included in the sale to Stinchfield, which was known as the Rice vein. The apices of two veins, called respectively the "West" vein and the "Pine Tree" vein, were within the surface boundaries of the Pine Tree claim, while the apex of the Rice vein was on that portion of the claim not sold to Stinchfield. Immediately after the sale to Stinchfield Gillis made a new location on the part not sold, and a few days afterwards Stinchfield also made a new location on the part of the claim he had purchased from Gillis. In other words, both parties abandoned the "Carrington" location, and each for himself made a new location of his part of the claim, Gillis being the elder. Rice, who was working for Gillis, followed his vein down to where it intersected the "West" vein, under the surface conveyed

to Stinchfield and removed ore at the point of the intersection of the two veins, of the value of about $10,000. Stinchfield brought suit against Rice and Gillis to recover for this trespass, and notwithstanding his was the junior location, recovered judgment. Under the provisions of Sections 2336, U. S. Rev. Stats., providing that all ore in the space of the intersection of two veins, shall belong to the prior locator, Gillis would have been entitled to the ore but for the estoppel created by his deed. If one right of this character conferred by the statute may be thus lost, another right of the same character may be lost in the same way.

Another case directly involving this right of extra-lateral pursuit is that of *Boston & Montana Consolidated C. & S. Co.* v. *Montana Ore Purchasing Co.*, 89 Fed. 529. The plaintiff had sold a portion of its Johnstown lode claim to the defendant and conveyed it by metes and bounds. The westerly line of the deeded portion ran from a point about a third of the way across the claim from its northern boundary to the south side line of the claim in a southwesterly direction. The end lines of the Johnstown ran nearly north and south, and plaintiff's contention was that the defendant's extra-lateral rights should be confined to a plane drawn down parallel with the end lines of the claim. This would have made a very considerable triangular piece of ground embraced in the deed practically worthless. The Court held the plaintiff estopped by its deed and refused to grant it the injunction prayed for. It seems to us that these cases only apply the general doctrine of estoppel by deed to this class of property, and that they are sound law.

AUTHORITIES CITED IN SUPPORT OF MOTIONS NOT APPLICABLE.

In support of the motions to dismiss the writs of error, counsel therefor have cited *Colorado Central Mining Company* v. *Turck*, 150 U. S. 143, and other cases. The Turck case was decided upon the question of the right of a writ of error to this Court upon the ground that it appeared from the original complaint that jurisdiction in the Federal Court was made to depend entirely upon the diversity of citizenship of the parties, and hence is not applicable to this case. When the original complaint in this case was filed, jurisdiction did not depend entirely upon the ground of diversity of citizenship, or at all upon that ground, for, as we have pointed out above, that ground did not exist and could not have existed in the original complaint, and in the amended complaint, upon which the case was tried; a Federal question was by its allegations presented, along with a statement of the diversity of citizenship of the defendants then remaining upon the record, from which it results that it cannot now be claimed that jurisdiction was made to depend entirely upon diversity of citizenship. The facts presenting the Federal question and diversity of citizenship are both alleged in the complaint, and left to the legal effect which naturally follows from them, neither being specifically designated as the ground of jurisdiction. The difference between this case, as we have presented it, and the *Colorado Central Mining Company* v. *Turck*, upon this question, and the line of cases cited by counsel in support of their motions, is so great and clearly marked that we do not feel we would be justified in taking up and discussing each case separately.

Conclusion.

By reference to our assignment of errors, it will readily be seen that we have made no reference in the foregoing argument to very many important questions presented on the face of the record, but we do not deem it necessary to do so upon the discussion of these motions. Consideration of them, and of the grave questions herein presented, can be more properly had upon the hearing of this case on its merits, and we feel sure that this Court will not dismiss these writs of error until it has heard full argument and carefully weighed and considered every proposition contained in them.

In this brief we have discussed, but not at length or completely or as fully as we would upon a hearing upon the merits, some questions other than those relating to the jurisdiction of the Court; and this has been done because of the presentation of a motion to affirm the judgment. That weighty questions are involved, we think has been clearly demonstrated. The apex law which is involved in this discussion is of serious consequence, fruitful in litigation, the occasion of great expenditures, the subject of much hostile criticism, and all of its many doubtful and uncertain interpretations should be as speedily set at rest as possible in the interest of the great industry with which it is inseparably connected. The Courts have held that the doctrine of extra-lateral rights is contrary to the settled principles of the common law, and to be strictly construed, and the earliest possible disposition of all questions growing out of it which affect the title to mines, is essential to the proper protection of the mining industry. The plaintiff in error complains of what it conceives to be an erroneous construction of the apex law, a construction contrary to the rules which should

be applicable to its interpretation, and presents a substantial case, and not a frivolous controversy in which it has suffered, as it believes, grievous wrong. The interpretation now placed upon the judgment and deed involved, and upon the apex law, takes away from it that which it received as the result of litigation and location, and gives it to the defendant in error, whose contradictory positions are well illustrated by the allegations of its answer in the specific performance suit and its replication in the present action, which are here called to the attention of the Court as indicating to some extent the methods of which the plaintiff in error complains, viz:

"Aver that the boundary lines of said St. Louis min-
" ing claim as originally located included and embraced
" the said *locus in quo*, and every part thereof, at and
" prior to the location of said Nine-Hour lode claim, and
" that said Charles Mayger and his successors in interest
" hath ever since been, and now are, in possession of the
" same, and entitled thereto. * * *"

Answer in Specific Performance Case (Record, page 38).

"And plaintiff alleges the fact to be that said thirty-
" foot strip, or Compromise Ground, was at all times a
" part and portion of the quartz lode mining claim known
" as the Nine-Hour claim, and that the same was never a
" part or portion of the St. Louis quartz lode mining
" claim mentioned in the complaint herein. * * *"

Replication in present action. (Record, page 13.)

The plaintiff in error, therefore, contends that important Federal questions are presented in this case; that the right to the writ of error is clear; that there is nothing frivolous or vexatious in the prosecution of its writ of

error, and that the case should proceed to a final adjudication of these important matters by this tribunal, clothed with the power to set at rest these questions which have vexed State and inferior Federal courts, and the importance of which, not only to the plaintiff in error in this case, but to those interested in mining generally is, we believe, apparent.

~~W. E. CULLEN,~~
~~CHARLES J. HUGHES, Jr.,~~
~~EDWARD C. DAY,~~
Attorneys for Plaintiff in Error.

~~ALDIS B. BROWNE,~~
~~ALEX. BRITTON,~~
Of Counsel.

W. E. Cullen
Chas. J. Hughes Jr.
Edward C. Day
Attys for Plaintiff in Error

Aldis B. Browne
Alex. Britton
Of Counsel.

IN THE

Supreme Court of the United States.

THE MONTANA MINING COMPANY, Limited, *Plaintiff in Error*,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error.* } No. 213.

THE MONTANA MINING COMPANY, Limited, *Plaintiff in Error*,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error.* } No. 214.

This cause is pending in this court on a motion to dismiss and affirm made by the Defendant in Error, and in our brief in opposition to that motion we fully explained how it happened that there are two records here, while there is really but one case. The record in No. 214 is the record upon a writ of error sued out by Defendant in Error from the Circuit Court of Appeals, to the Circuit Court of the Ninth Circuit for the District of Montana, to correct an alleged error made by that court in the trial of case No. 213. Upon the motions to dismiss and affirm, we presented everything we had to

say upon either branch of the case in one brief, and believing that this is the proper course to pursue, as tending to lighten, in some degree at least, the labors of the court, we will present the whole case in this single brief upon the merits. As to the questions discussed in our brief now on file, we will content ourselves with what we have said in that brief, and take up here the other features of the case which were not pertinent to the discussion in opposition to the motions of the Defendant in Error.

Statement of the Case.

The Defendant in Error, the plaintiff in the Circuit Court of the Ninth Circuit for the District of Montana, alleges in its second amended and supplemental complaint (Record 213, p. 1) that it is the owner of the St. Louis Quartz Lode Mining Claim, situate in Ottawa Mining District, County of Lewis & Clarke and State of Montana, and of the quartz rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral bearing rock through their entire depth, the top or apices of which, lie within the surface lines of the said mining claim, *save and except* that portion thereof known as the thirty-foot strip or Compromise ground, which, it is alleged, belongs to and is a part of what is known as the Nine Hour Lode Mining Claim, together with all mineral contained therein, which is the property of the defendant, the Montana Mining Company, Limited. It is further alleged that the dip

of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis mining claim, is to the east, and dips under and beneath the Nine Hour mining claim including the thirty-foot strip or Compromise ground. The portion of the vein having its top or apex within the St. Louis claim is described as entering the claim at a point on the east side line thereof, at a point from which corner No. 1, being the northeast corner of said mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, thence along said east side line and the westerly side line of the Compromise ground, to a point 108 feet from the point of intersection of the west side line of the Compromise ground, with the east side line of the St. Louis claim, between corners numbered 1 and 2, at which point, it is alleged, a projected end line parallel with the end line of its claim should be drawn down, as being the point where the hanging wall of the vein intersects the westerly side line of the Compromise ground. It is next alleged that the plaintiff is the owner of an additional portion of the said vein lying to the south of the southern point above mentioned, a distance of twenty-five feet, at which point the foot wall passes out of the east side line of the St. Louis Lode Mining Claim.

It is alleged that the defendant, Plaintiff in Error here, wrongfully and unlawfully, by means of drifts, shafts and underground workings, entered upon said vein on or about the 20th day of June, 1893, and mined and extracted therefrom quartz rock and ore of the value of $250,000, for which sum judgment is prayed.

The answer of the defendant (Record No. 213, p. 7) admits the allegations contained in paragraphs numbered 1, 2 and 3 of the complaint, which relate to the incorporation of the respective parties to the action, and to the ownership of the respective mining claims mentioned, and denies every other allegation contained therein. It then pleads affirmatively, and as new matter, a judgment rendered in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis & Clarke, wherein this Plaintiff in Error was plaintiff and the Defendant in Error was defendant, in and by which said judgment the Defendant in Error was ordered, adjudged and decreed to convey to the Plaintiff in Error the thirty-foot strip or Compromise ground, together with all mineral therein contained, and, it is averred that the plaintiff, the Defendant in Error here, was thereby estopped from claiming any part of the Compromise ground, or the mineral contained therein.

To this new matter the plaintiff replied (Record 213, p. 12), and after denying that it was for any reason estopped from claiming the mineral found in said Compromise ground, it admits the making, execution and delivery, by its predecessors in interest, of the bond for a deed, which was the basis of the action against it for specific performance; admits the judgment rendered, and the execution of the deed in pursuance thereof, but alleges that no other right or title was conveyed other than such as was attached and incident to said Compromise ground, as a part of the Nine Hour Lode Claim, and

that it comprised only such minerals as were contained in veins, lodes or ledges having their tops or apices inside said thirty-foot strip, all of which, it was alleged, would more fully appear by reference to the judgment roll in said cause, which it prayed might be considered by the court as if fully set forth by it in its replication.

The history of the "thirty-foot strip" or "Compromise ground" so frequently mentioned, may be gathered, so far as it is material for this case, from the record of the Specific Performance case (Record 213, p. 32). As originally located there was no conflict between the St. Louis, and the Nine Hour claims, but when the St. Louis was surveyed for patent, the easterly boundary line was wrongfully extended over the Nine Hour so as to embrace a portion of the last named claim. Upon application being made in the Land Office, to enter the St. Louis as surveyed, our predecessors in interest, the owners of the Nine Hour claim, filed an adverse claim and thereafter caused suit to be brought thereon in a court of competent jurisdiction, to determine their right to the possession of the area in conflict. Before this action came to trial, the parties compromised; the owner of the St. Louis claim agreeing to patent his claim as surveyed, and in consideration of the Nine Hour dismissing their action in court, and withdrawing their adverse claim in the Land Office, to convey to them the "Compromise ground," being a strip of ground thirty feet in width, the westerly line of which was to be parallel with the easterly side line of the St. Louis claim, between corners numbered two and three

thereof. The parties thereupon entered into a bond in writing, whereby the owner of the St. Louis claim bound himself, his heirs and assigns, to procure as soon as practicable a government patent for his said St. Louis claim, and when such patent was procured, to deed the said ground, describing it by metes and bounds, *together with all the mineral therein contained*, to the obligees named in the said bond, their heirs or assigns (Record 213, p. 36). The predecessors in interest of the Plaintiff in Error thereupon duly performed the conditions upon their part so by them to be kept and performed, by dismissing their said suit, and by withdrawing their said adverse claim in the Land Office. The owner of the St. Louis claim thereupon proceeded to obtain a patent for his claim, but, instead of conveying said Compromise ground to the owners of the Nine Hour, their heirs or assigns, he wrongfully and for the purpose of cheating and defrauding the Plaintiff in Error, who was successor in interest to the obligees named in said bond, conveyed it to the Defendant in Error. The Defendant in Error having refused, on demand being made, to make a deed to the Plaintiff in Error for the Compromise ground, and having full notice of the rights and equities of the Plaintiff in Error, a suit was commenced to enforce the specific performance of the contract, which resulted in the judgment which is pleaded in our answer in this case as an estoppel.

Prior to the determination of the action just named, the Defendant in Error had brought this action against us to recover damages for ores taken and mined by us

out of the Compromise ground, but which was not brought to issue or trial until long after final judgment was obtained in the specific performance case. On a trial of this case to a jury, the Circuit Court held that the plaintiff, Defendant in Error, was entitled to extra-lateral rights on the Drum Lummon lode, although it entered the St. Louis claim and departed therefrom through the same boundary line, to-wit, the east side line; that, in order to show that the same was the east side line of its claim, it was entitled to prove, without alleging it in its complaint, the strike and dip of its discovery vein; that it was entitled to recover of Plaintiff in Error for ores mined and taken from the Compromise ground; that in effect the words "*together with all the mineral therein contained*" found in the bond for a deed, in the judgment of the court in the action for the specific performance of said bond, and in the deed made, executed and delivered in pursuance of such judgment, meant only such minerals as were found in veins, lodes or ledges having their tops or apices within the surface boundaries of such Compromise ground. And the court having committed divers and sundry other errors, the Plaintiff in Error particularly specifies the following upon which it will rely for a reversal of the judgment rendered in this action.

Assignment of Errors.

I.

The Circuit Court erred in overruling the defendant's objection (Record 213, p. 36) to the introduction of any

testimony on the part of the plaintiff, for the reason that the second amended and supplemental complaint, which had theretofore been read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts showing that the plaintiff had no cause of action.

II.

The Circuit Court erred in permitting the witness, William Mayger, to testify that the discovery vein of the St. Louis mining claim ran more parallel with the location of the claim than in any other direction, for the reason that the testimony was irrelevant and immaterial, it not being alleged in the complaint that there was any discovery vein in the St. Louis mining claim, and no allegation therein as to the strike, course or direction in which such vein ran. (Record 213, p. 17.)

III.

The Circuit Court erred in admitting any and all of the testimony offered with reference to the discovery vein of said St. Louis claim, for the reason that the same was irrelevant and immaterial under the pleadings. (Record 213, p. 17.)

IV.

The Circuit Court erred in permitting the witness, James S. Keerl, to testify that the lines representing the planes drawn upon plaintiff's Exhibit No. 1, were drawn parallel to the end lines of the St. Louis claim, for the reason that the same was incompetent and immaterial,

it not having been established by competent proof, which were the end lines or which the side lines of the St. Louis claim. (Record 213, p. 18.)

V.

The Circuit Court erred in permitting the witness, James S. Keerl, to give the dimensions of blocks 8, 9, 10 and 11, which were situated north of the one hundred and eight foot plane, as shown upon plaintiff's Exhibit No. 1, and north of the plane intersecting the easterly boundary line of the St. Louis claim, at the point where the westerly boundary of the Compromise ground intersects it, for the reason that the same was incompetent, irrelevant and immaterial under the pleadings, it being alleged in the complaint that the defendant was the owner of the ground known as the "Compromise ground," "*together with all the mineral therein contained*," and it being alleged in the answer that the said Compromise ground had been conveyed by the plaintiff to the defendant in pursuance of a judgment rendered upon a bond for a deed, which deed conveyed said ground to the defendant, and describing the same by metes and bounds, and including in such conveyance all mineral therein contained, which allegations were not denied by the replication, but were specifically admitted therein, and the judgment roll in said case made a part thereof, wherein and whereby the plaintiff was estopped from claiming any mineral found within said Compromise ground. It plainly appeared from the testimony of the witness, that the mineral about which he was testifying,

was found wholly within the vertical lines of the said Compromise ground.

VI.

The Circuit Court erred in permitting the witness, John R. Parks, to testify that the discovery vein of the St. Louis claim ran generally parallel to the side lines of said claim, for the reason that there was no issue made by the pleadings relative to the discovery vein of said claim, or the course or direction in which the same ran. (Record 213, p. 20.)

VII.

The Circuit Court erred in permitting the witness, John R. Parks, to testify as to the contents and value of Blocks Nos. 8, 9 and 10, for the reason that it appeared by the testimony that said blocks were wholly within the Compromise ground, which, it was admitted by the pleadings was the property of the defendant, together with all the mineral therein contained, and it further appearing by said pleadings that the plaintiff was estopped from claiming said mineral contained in said blocks or any thereof. (Record 213, p. 21.)

VIII.

The Circuit Court erred in permitting the witness, John R. Parks to testify that the four hundred foot level had been used by the defendant in the operation of its mine, for the reason that the same was irrelevant and immaterial, in that this is an action for the recovery of

damages for the alleged extraction and conversion of ores claimed by the plaintiff, and not an action to recover for the use of levels constructed by the defendant upon its own property. (Record 213, p. 22.)

IX.

The Circuit Court erred in permitting the witness, Walter Proctor Jenny, to testify that the discovery point of the St. Louis lode claim, was connected with a vein called the discovery vein, and in permitting the said witness to describe the said vein, for the reason that the same was immaterial and irrelevant, there being no allegations in the complaint with reference to the discovery vein of the St. Louis lode mining claim, and no issue in the pleadings with reference thereto.

X.

The Circuit Court erred in admitting in evidence, in rebuttal, the complaint and exhibits attached thereto, the answer, findings and judgment of the court in the case in the District Court of the First Judicial District of the State of Montana, wherein the Montana Mining Company, Limited, was plaintiff and the plaintiff herein was defendant, for the reason that the same was not in rebuttal of anything proven or offered to be proven on the part of the defendant, and for the further reason that the evidence was not material, there being no ambiguity in either the bond or deed, attached as exhibits to the defendant's answer herein, and therefore there was nothing for the court to construe. (Record 213, pp. 32 to 44.)

XI.

The Circuit Court erred in refusing to give to the jury the following instruction requested by the Plaintiff in Error:

"The parties to this action have by agreement settled the boundary line between their two claims by establishing the western side line of the Compromise ground as such boundary line, and the plaintiff having conveyed by deed the said Compromise ground to the defendant, you are instructed that you cannot find a verdict for the plaintiff for any ores except such as you find were taken out north of a line drawn down from the point of intersection of the westerly boundary line of the Compromise ground, with the easterly boundary of the St. Louis lode, parallel with the end lines of the said St. Louis lode, and lying between said lines, as claimed in the complaint." (Record 213, p. 45.)

XII.

The Circuit Court erred in refusing to give the jury the following instruction:

"The plaintiff having heretofore conveyed to the defendant the strip of ground known as the thirty-foot strip, or Compromise ground, describing the same by metes and bounds, and by such deed having conveyed the same, together with all the mineral therein contained, and it not appearing that such deed was obtained by any fraud practiced by the defendant upon the plaintiff, you are instructed that in and by such deed the plaintiff is

now estopped from claiming any mineral whatever which was or is contained in said Compromise ground, and this without regard to where the lead, in which said mineral has been, is, or may be found, has its apex. The court instructs you that the plaintiff in the action can only recover for such mineral bearing quartz rock and ore as you shall find the defendant has mined, taken and converted to its own use lying east of the east line of the Compromise ground and between the lines mentioned in the complaint, whereat the plaintiff asks to have projected lines drawn down parallel to the end lines of its St. Louis claim." (Record 213, p. 45.)

XIII.

The Circuit Court erred in refusing to give the jury the following instruction:

"If you believe from the testimony in the case that the defendant, though it mined the ore in which the plaintiff has designated as Blocks 8 and 11, has not converted the same, but yet has such ore ready to deliver to said plaintiff, should this court finally decide the plaintiff to be the owner thereof, you cannot include the same or the value thereof in any verdict you may render for the plaintiff. Such ores as are thus held under and subject to the order of this court, have not been converted by the defendant." (Record 213, p. 45.)

XIV.

The Circuit Court erred in refusing to give the jury the following instruction requested by the Plaintiff in Error:

"You are instructed that this is an action for damages occasioned by trespass and the taking and carrying away of ore. To maintain this action the plaintiff must have been in the possession of the premises and the place of trespass at the time of the commencement of this action and at the time of the trial, and the burden of proof was upon the plaintiff to show such possession. The plaintiff has failed to introduce any evidence of such possession except such as arises by operation of law from the possession of the apex of the vein, from which the ore is alleged to have been extracted. This is termed constructive possession. On the other hand, the evidence is clear and uncontradicted that the defendant had, and still has, actual possession of the surface ground from underneath which the ore was extracted by the defendant company, and possession of the place of trespass. Under this state of circumstances the plaintiff is not entitled to recover in this form of action, and your verdict will be for the defendant." (Record 213, p. 46.)

XV.

The Circuit Court erred in refusing to give to the jury the following instruction requested by the Plaintiff in Error:

"You are instructed that in this case the burden of proof is upon the plaintiff to make out by a preponderance of the testimony every fact material to its cause of action. It must not only show that ore has been taken by the defendant, of which it is the owner, but before it can be entitled to recover it must show the market value

of the ore so taken, and in determining the value of the ore so taken you are instructed that the plaintiff is entitled to the value of the ore as it stood in the mine; and in estimating this value you will take into consideration whether or not the ore as it stood in the mine was of sufficient value to pay the cost of extraction and milling and reducing it to bullion in the ordinary method of reducing such ores in the vicinity where the ore was taken; and if from the evidence you find that the ore so taken by the defendant, if you find any was taken, was not of sufficient value to pay the cost of such extraction and reduction, then the plaintiff is not entitled to recover for such ore." (Record 213, p. 46.)

XVI.

The Circuit Court erred in giving the following instruction during its charge to the jury:

"Instruction No. 1.—The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east and that there is another vein having a section of its apex wholly within the St. Louis claim between the planes known as the 520 and 108." (Record 213, p. 47.)

XVII.

The Circuit Court erred in giving the following instruction during its charge to the jury:

"Instruction No. 2.—In estimating damages, if the

jury find that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by mixing the ore taken from plaintiff's ground with ore belonging to the defendant, or with any other material taken from any other place, then the jury are at liberty to consider the highest value of ore found in the vicinity of that ore." (Record 213, p. 47.)

XVIII.

The Honorable, the Circuit Court of Appeals within and for the Ninth Circuit, erred in affirming the judgment rendered in the United States Circuit Court for the Ninth Circuit, within and for the District of Montana, in said action, and in its refusal to reverse and set the same aside, because of some one or more or all of the errors hereinbefore specified.

XIX.

The Circuit Court of Appeals erred in refusing to give full faith and credit to the judgment in the District Court of the State of Montana in the Specific Performance case, as the same appears in the transcript herein on page 32 *et seq.*, and in refusing to hold that the Defendant in Error was not estopped and enjoined, in and by such judgment, from claiming any mineral found in the said thirty-foot strip or Compromise ground.

XX.

The said Circuit Court of Appeals erred in holding that the plaintiff was entitled to follow the vein on its

dip so long as any part of the apex of the vein was found within its St. Louis claim; in other words, that it was entitled to follow the vein on its dip to what it has termed its "133 foot plane." (Record 214, p. 50.)

Argument.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The defendant, plaintiff in error here, at the beginning of the trial, after the jury had been sworn, but before any evidence had been offered by the plaintiff, objected to the introduction of any testimony whatever on the part of the plaintiff, for the reason that the second amended and supplemental complaint, which had theretofore been read to the jury, did not state facts sufficient to constitute a cause of action, and did state facts which showed that plaintiff had no cause of action. (Record 213, p. 16.) The Circuit Court of Appeals seems to be of opinion (Record 213, p. 65) that this objection should have been raised by motion or demurrer, at some previous stage of the case, and that by not so raising it we have waived it. Under the provisions of the Code of Civil Procedure of the State of Montana an objection to the complaint, that it does not state facts sufficient to constitute a cause of action, or one going to the jurisdiction of the court, is never waived (*Mont. C. C. P.*, sec. 685), and may be raised at any stage of the case. That an objection upon either of these grounds could not be waived

by a failure to demur, and might be urged at any time, even in an appellate court, was early set at rest in this state.

Territory v. Virginia Road Co., 2 Mont., 96.
Gillette v. Hibbard, 3 Mont., 413.
Foster v. Wilson, 5 Mont., 53.
Quirk v. Clark, 8 Mont., 231.

The doctrine of these decisions is so universally the law, that we doubt if a single case can be found which conflicts with them.

We have set out the allegations of the complaint very fully in our statement of the case herein. It avers that the plaintiff is the owner of the St. Louis mining claim, describing it by metes and bounds, at great length, and with unnecessary particularity, and "of the quartz rock and ore and precious metals contained in any and all veins, lodes and ledges, or mineral-bearing rock through their entire depth, the tops or apices of which lie within the surface lines" of the same. In subdivision four of its complaint, it alleges that one of the veins having a portion of its top or apex within the surface boundaries of the St. Louis claim, enters the same through the east side line, and after traversing the said claim for a given distance, departs out of the claim through the same side line; that it dips to the east and under the Nine Hour claim including the Compromise ground; that it is entitled to have lines drawn down, at the point where such lode enters, and at the point where it departs from its said St. Louis claim parallel to the end lines of its claim,

marking the northerly and southerly boundaries of the plane within which it alleges it has the right to follow the vein on its dip extra-laterally and under the Nine Hour claim. For some reason which we have never had given us, the pleader has designated two points at the southerly end, through which this line should be drawn down, one at the point where the hanging wall of the vein crosses the westerly boundary of the Compromise ground, and the other at the point where the foot wall of the vein crosses the same line, which he has designated respectively his "108 foot plane" and his "133 foot plane." Out of this lode and within the plane aforesaid, it is alleged that the defendant has extracted and converted to its own use, mineral to the value of two hundred and fifty thousand dollars. These allegations are all squarely denied by the answer, and every material fact alleged in this subdivision of the complaint is put in issue. Remembering now, that extra-lateral rights for this vein are being asserted in what is confessed to be our ground, where every presumption and intendment of the law is in our favor, let us inquire what the plaintiff is required to prove. Manifestly it is, that the lines which it has denominated its side lines, and its end lines are in truth and in fact what it has thus called them. And how is this to be shown? By showing which of these lines is crossed by its discovery vein on its course through the claim. The end lines are not those lines which the locator has called such in the location of his claim, but they are such as are actually crossed by the discovered vein on its strike.

Flagstaff Mining Co. v. Tarbet, 98 U. S., 463, 468.
Iron Silver M. Co. v. Elgin M. Co., 118 U. S., 196.
Argentine M. Co. v. Terrible M. Co., 122 U. S., 478.
King v. Amy & Silversmith M. Co., 152 U. S., 222.
Del Monte M. Co. v. Last Chance M. Co., 171 U. S., 57.
Walrath M. Co. v. Champion M. Co., *ibid*, 293, 307.

Upon this question, nothing clearer or more explicit is to be found, than in the case last cited.

Mr. Justice McKENNA, speaking for the court, after referring with approval to what Mr. Justice BREWER has said in the Del Monte case, *supra*, relative to the location made on the surface controlling rights under the surface, and that whether a given line was in fact an end line or a side line, depended, not upon what it was called by the locator, but upon the course or strike of the lode through the claim, he says:

"These propositions we affirm, with the addition that the end lines of the original vein shall be the end lines of all the veins found within the surface boundaries."

A recent case, decided by a Judge who has a very wide experience in the determination of these questions, is that of *Cosmopolitan Mining Company v. Foote*, 101 Fed. Rep., 518.

Says HAWLEY, *J.*, in this case, page 521:

"The defendants' contention seems to be that because they claim they have subsequently discovered the apex of a lode running northerly and southerly, at the easterly line of their surface location, they have a right to follow the lode on its dip

underneath the Cosmopolitan claim, without regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location and find out what the defendant Foote located; because, if he located on a lode that he thought had a northerly or southerly course, and made his location accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his right by the facts as they are shown to exist, instead of what he thought existed at the time the location was made."

In this case, the Cosmopolitan case, the court found from the testimony that the discovery lode ran more nearly in an east and west direction through this claim, than it did in a north and south direction, and for this reason refused to give the defendant extra-lateral rights under the Cosmopolitan surface.

But it is alleged in the complaint that the St. Louis is a patented claim, and this fact raises certain conclusive presumptions, among which is, that there was a valid *bona fide* discovery within its boundaries, of quartz, or other rock in place, carrying some one or more of the metals named in the Mineral Land Act.

Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S., 499
Carson G. & S. M. Co. v. North Star M. Co., 83 Fed., 658, and cases there cited.

But, in no case yet decided, has it been held that a patent to a mining claim raises a legal presumption that

the vein or lode, on its strike, passes through the claim from end to end as staked out on the ground by the original locator, or that the discovery vein runs in any particular direction, or that it is continuous from end to end of the claim; or that its dip is in any given direction. Where, as in the case at bar, rights in other veins found within the exterior boundaries of a mining claim, are dependent upon the rights secured in the discovery vein by the location, these are matter of allegation and proof, unaided by any legal presumption whatever. A complaint which claims rights upon a by, or accidental vein, found within the surface boundaries of a mining claim, which is silent as to the rights acquired upon the discovery vein by the location thereof, does not state material facts which the plaintiff must show to entitle him to recover, and does not state facts sufficient to constitute a cause of action.

IV.

THE COMPLAINT SHOWS THAT PLAINTIFF HAS NO CAUSE OF ACTION.

As we have already seen, the plaintiff alleges that plaintiff is the owner of, and in the possession of the St. Louis claim, as the same was originally surveyed for patent, "*save and except* that portion thereof known as the 'thirty-foot strip' or 'compromise ground,' which belongs to and is a portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is

described as follows, to-wit: *(Here follows description of Compromise ground by metes and bounds)* including an area of about 12844.50 square feet, together with all the mineral therein contained." (Record 213, p. 3.)

Here then, is a clear positive allegation that the plaintiff is the owner of all the St. Louis claim as originally surveyed for patent, and of all mineral contained therein, *except* the portion thereof designated as the Compromise ground, and the mineral therein contained, which it does not own.

The third paragraph of the complaint (Record 213, p. 3) proceeds to inform us as to who is the owner of the Compromise ground to which it has just disclaimed ownership.

"That the said defendant Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode Mining Claim, situate and being east of the said St. Louis Lode Mining Claim, and including the 30-foot strip or Compromise ground aforesaid."

This is as plain an allegation that the plaintiff *did not* own, was not in the possession, nor entitled to the *possession*, of the so-called "Compromise ground," nor *of the mineral therein contained*, and that the defendant was the owner of the same, as the wit of man could devise. And yet every pound of ore for which the plaintiff was suing to recover laid in this same Compromise ground. In this connection it is to be borne in mind, that this is an allegation of fact in a verified pleading, and is not the mere recital of the language used in the bond, the judgment,

or the deed made in pursuance of the judgment, and as a part of it.

And in the complaint there is nowhere to be found an allegation that the plaintiff is the owner of the mineral found in the Compromise ground, and for the extraction of which it has judgment in this action. In paragraphs 4 and 5 of the complaint (Record 213, pp. 3 and 4) there is a claim to recover damages for ores mined from a vein having a portion of its top or apex inside the surface boundaries of the St. Louis claim, which vein, on its dip, passes under and beneath the "Compromise ground," but there is no allegation contained in either of these paragraphs, or elsewhere in plaintiff's pleadings, that it is the owner of this vein, or of the mineral contained in it, or in the "Compromise ground."

In saying this, we do not overlook the allegation found in the beginning of the second paragraph of the complaint, that the plaintiff is the owner of the St. Louis Lode Mining Claim, and of the quartz rock and ore and precious metals, contained in any and all veins, lodes and ledges of mineral bearing rock, through their entire depth, the tops or apices of which, lie within the surface lines of its claim. This allegation relates, by the very terms used, only to lodes having their *entire* apices within the surface boundaries of the claim, and not to a lode, which it is alleged has only a portion of its apex within the surface boundaries of the claim. Then again, from this allegation of ownership of quartz rock and ore claimed in veins having their apices within the surface

boundaries of the St. Louis claim, we have expressly excepted therefrom, in the same paragraph, the Compromise ground and all mineral contained therein.

In the absence of all allegation of ownership of the mineral in the "Compromise ground," or of anything that can be tortured into such allegation, there is not much room for construction. But if there were, while the allegations of a pleading are always to be fairly construed, it is a familiar rule, that where there is an ambiguity in the language used, fairly admitting of two constructions, it is to be construed most strongly against the pleader. There is no precedent for holding that a plaintiff does not intend, or mean exactly what he says, when he employs plain and unambiguous language to define what he claims and disclaims.

V.

A VEIN OR LODE WHICH ENTERS AND DEPARTS THROUGH THE SAME SIDE LINE OF A CLAIM, HAS NO EXTRA-LATERAL RIGHTS.

We have already discussed the question quite fully in our brief on the motions to dismiss and affirm, and we have only a suggestion or two to add to what is there said.

In considering the question of the sufficiency of the complaint, this Court will regard it from the standpoint of the Circuit Court, when our objection was made to the introduction of any testimony whatever on the part of the plaintiff, because its complaint did not state a cause

of action. It will be remembered that when our objection was made, not only was the complaint entirely silent upon the question of there being a discovery vein within the surface boundaries of the St. Louis claim, but no word of testimony had then been given regarding the discovery vein, its strike or dip. The Circuit Court had then to deal with a mining claim, which so far as the allegations of the complaint showed had but a single vein in it, and that entered and departed through the same boundary line. There was nothing alleged in the complaint by which the court could determine whether the line that was thus crossed by the apex of the lead was a side line, or an end line of the claim, and extra-lateral rights in an easterly direction are claimed for this vein. Can there be any doubt about the proposition that such a complaint not only does not state facts sufficient to constitute a cause of action, but does state facts showing that the plaintiff has no cause of action? It alleges, in effect, that the same line constitutes the end line of both ends of the only vein shown by the complaint to be within the surface boundaries of its claim. It might be said to be a double end line, in, that the same line terminates plaintiff's rights at both the northerly and southerly end of its apex; but at all events, and with no showing to the contrary, it is an end line in the fullest sense of the term, and partakes of all of the qualities incident to an end line. Can anything be clearer than that by the provisions of *U. S. Rev. Stats.*, sec. 2322, an end line absolutely terminates the right to pursue a vein, and that too without regard to whether such pursuit is on the strike

or the dip? If this vein ran parallel to an actual end line of the claim and so close to it as to dip under it, in its downward course into the earth, it could not be contended that the vein could be pursued on its dip beyond such end lines.

Parallelism of the end lines is essential to the existence of extra-lateral rights.

Iron S. M. Co. v. Elgin M. Co., 118 U. S., 196.
Montana M. Co. v. Clark, 42 Fed., 628.
Tyler M. Co. v. Sweeney, 54 Fed., 284.

Where a vein, as in the case at bar, enters and departs through the same line, there can be nothing to define the plane within which the vein can be pursued, and hence when this occurs the miner must content himself with what he finds within his own surface boundaries, and cannot pursue it into the territory of his neighbor.

VI.

WHEN AN APEX OF CONSIDERABLE WIDTH CROSSES A SIDE LINE AT AN ACUTE ANGLE, WHERE SHALL THE BOUNDARY PLANE BE DRAWN?

This is the question presented by the record in case No. 214. The subject was touched upon in our brief in response to the motion to dismiss. And if the Court should deny the motion, we present the following in addition to the discussion therein contained.

The question here raised, as applied to the case of a vein departing from the side line of a claim at an angle,

seems to be one of first impression, as in no reported case has it been raised and actually passed upon. The nearest approach to it is the Black Rock-Niagara case, reported under the title of *Fitzgerald v. Clark*, 17 Mont., 100.

The second assignment of error in the Supreme Court of Montana in that case was as follows:

"The Court instructs the jury that if the whole of the apex of the Niagara vein or lode appears at any point within the surface location of the Niagara claim, then the respondent had the right to follow it on its dip beneath the surface of the Black Rock claim."

In that case the apex of the vein crossed the southern side line of the Niagara at a sharp angle, and while nothing is said as to the width of the lode, it must have been of some width leaving a wedge-shaped piece or portion of the apex inside the Niagara ground before the entire apex was within the surface boundaries of that claim; and yet the court instructed that it was only entitled to extra-lateral rights on the dip of the vein where the whole apex was within its surface boundaries. And the jury found that the apex of the vein in controversy passed entirely within the lines of the Niagara lode. 17 Mont., 103. Exceptions were not properly saved to the instructions, but the Supreme Court considered them on objections to the insufficiency of the pleadings, and the judgment of the court below was affirmed. The case was carried on writ of error to the Supreme Court of the United States, where it was again affirmed.

Fitzgerald v. Clark, 172 U. S., 92.

Counsel for Defendant in Error relied upon the case of *Bullion, Beck & Champion Mining Co. v. Eureka Hill Mining Co.*, 5 Utah, 3; 11 Pac., 515. That case involved a controversy over what has been termed a "split" vein, or a vein whose apex was so wide that the surface lines of the claim did not cover the entire apex of the vein; or in other words, the apex was bisected on its strike by the side line. But even as thus explained the case has not been accepted as authority. It was decided by a divided court, and Mr. Lindley, in his work on Mines, sec. 583, discusses the question at considerable length, and maintains the proposition that the entire width of the apex must be included in the location in order to give extra-lateral rights on the dip. In support of this contention he cites the opinion of Judge HALLETT and of Mr. Justice MILLER, as expressed in the case of *Hall v. Equator Mining Co.*, 11 Fed. Cas., No. 5931. So, too, Mr. MORRISON in his work says:

"The holding in the Equator case, as far as we know, has been uniformly followed by the *nisi prius* courts, and we cannot doubt that it is a correct application of the statute to the subject matter."

Morrison's Mining Rights, p. 112.

And Messrs. BARRINGER & ADAMS, speaking of the Utah case, says:

"And it has been held in Utah that this ownership extends to the entire width of the vein, even where the width of the apex is such as to extend beyond the side lines of the claim. It is hardly to be supposed that this will be followed elsewhere."

Barringer & Adams on Mines and Mining, p. 442.

And Judge KNOWLES, who tried the case at bar, speaking for the Court in the case of *Waterloo Mining Co. v. Doe*, 82 Fed., 45, says:

"The fact that a part of the apex might be in the ground granted would not give any right to that part of the apex which is not therein, although the apex might be cut by both end lines of the granted premises. There is no case that supports this doctrine. The case of Bullion, Beck & Champion Mining Company v. Eureka Hill Mining Company, 5 Utah, 3; 11 Pac., 515, is a case where the croppings were cut on the strike of the same by a side line of a location."

The case of *Colorado Central Consolidated Mining Company v. Turck*, 50 Fed., 889; 54 Fed., 262, again presented the question of a split or forked vein, and the Circuit Court of Appeals for the Eighth Circuit there established the rule that the senior location could only follow the vein to the extent of its outcrop, whether it be the outcrop of a broad vein or a forked vein; that when the outcrop passed on to the adjoining claim, that belonged to the owner of the latter claim, though the latter was a junior location. It will be noticed that in that case the controversy related to the bisection of a vein or fork by a side line, and the ores were extracted from a vein whose apex was clearly without the Colorado Central lines. So that the Bullion Beck case has not only been discredited by the text writers, but it has been distinctly repudiated by the Federal courts of both the Eighth and Ninth Circuits.

But in the present case what is spoken of as the side line of the St. Louis mining claim is an end line in so

far as it affects the rights of the Defendant in Error to the Drum Lummon vein at the points in controversy. The side line of the St. Louis mining claim crosses the strike of the vein and cuts off the right of the Defendant in Error to follow the vein on its dip. There would seem to be no question but that this would be true, if it were the located vein with which we were dealing. This proposition is iterated and reiterated in every side-end line case from the Flagstaff case in the 98th U. S. Rep. to the Walrath case in 171 U. S. Rep. No proposition of mining law can be said to be better established. If it would be true with reference to the located vein, no reason can be urged why it should not be true with reference to the accidental veins found within the claimant's surface boundaries. The citations of counsel to the effect that the end lines of the claim as located, are the end lines of this accidental vein for all purposes, do not support their contention. They merely hold that the end lines of the located claim determine the direction of the planes bounding the limits of all other veins within the location, and fix points and directions beyond which the locator cannot go in the exploration of every other vein found within his surface location. They do not hold, in cases where the accidental vein pursues different directions of course or dip, and departs from the surface side lines of the claim at different angles, that the extra-lateral rights of the claimant must be extended to the end line planes as located; in other words, the located end lines are boundaries of limits beyond which the locator cannot go. The extra-lateral rights, if any, which at-

tach to accidental veins, are to be determined within these planes by reference to the direction of the particular accidental vein. And, as in the case at bar, where the accidental vein enters and departs from the same side line, if such accidental vein is entitled to extra-lateral rights at all, they are cut off whenever and wherever the accidental vein on its strike begins to depart from the side line, for the reason that as to that particular vein at that point, the side line becomes an end line. This is clearly shown by the language of Mr. Justice McKENNA in the case of *Walrath v. Champion Mining Company*, 171 U. S., 293, 307.

"This Court in Del Monte Mining Co. v. Last Chance Mining Co., decided at the present term, ante, 55, reviewed the cases we have cited, and speaking for the court, Mr. Justice BREWER said:

"'Our conclusion may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein the top or apex of which lies inside of such surface lines extended downward vertically, becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law declares that those which he called end lines are in fact side lines, and

this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular.' Mining Company v. Tarbet, U. S., 463-468.

"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

It is apparent that the term "end lines" as used in this last sentence is used in the same sense as it was used by Mr. Justice BREWER in the Del Monte case. These "end lines" serve two purposes, the one being the fixing of the direction of the bounding planes, the other the termination of the right of the locator to pursue the vein on its dip beyond his surface lines. And it will be noted that the exception mentioned by Mr. Justice BREWER is the latter purpose. In other words the "end lines" which fix the direction of the bounding planes are always the surface or actual "end lines." The "end lines" which terminate the locator's right to follow the vein are the lines cutting the course of the vein, and are fixed by the court from the evidence at the trial. In the former sense only can it be said that the "end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

The distinction between the several functions or purposes of end lines here contended for was pointed out by

Mr. Justice DEWITT in *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont., 575, in the following language:

"The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end line plane, that plane must take effect where the strike in fact ends; that is, at a point on the side line (point e, Fig. 1); and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east side line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any re-adjustment according to developments. The parallelism of the end line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line."

The principle thus announced was correct, although it was not applicable to the facts in the Amy Silversmith case. In that case the lode on its strike crossed both side lines of the claim, and consequently the lines which the locator had designated as end lines were in fact side line. The case, in this respect, was like the Flagstaff case, and this Court was obliged to reverse the decision of the Supreme Court of Montana for this reason. Says Mr. Justice FIELD, speaking for the Court:

"The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines."

King v. Amy & Silversmith M. Co., 152 U. S., 222-229.

The lead, on its strike, also crossed the south side line, so called, of the claim, and that was therefore also an end line. If any projected end lines were to be drawn down in this case, they must have been drawn down parallel to these two, so called, side lines, and if these two side lines were not parallel to each other then no projected end lines could be drawn down, and there would be no alternative except to deny to the claim all extra-lateral rights.

When the lode on its strike crosses an end line, and a side line of the claim, then a different condition arises and the doctrine quoted above from the Amy Silversmith case in the Supreme Court of Montana becomes applicable as is shown by

Del Monte M. Co. v. Last Chance M. Co., 171 U.S., 55.

Clark v. Fitzgerald, *idem*, 92.

The question at issue here is not whether a locator is entitled to any extra-lateral rights upon a vein whose apex is partly within the surface lines, which was the question involved in the Bullion-Beck and Turck cases. But the controversy is as to the point at which the plane terminating the locator's rights shall be drawn.

Whether the Defendant in Error is to have any extra-lateral rights upon the Drum Lummon vein will be determined by the decision in case No. 213. The extent of those extra-lateral rights is here involved. And we contend that the side line of the St. Louis mining claim at the point where it cuts the hanging wall of the Drum Lummon vein becomes an "end line" for the purpose of fixing the point at which the bounding plane, parallel to the located end line, must be drawn, and that beyond that plane the Defendant in Error has no right to pursue the vein on its dip, because it has crossed its end line. So that we contend that the trial court was not in error in holding, as it did, that the plaintiff must show itself entitled to the whole of the apex at the point in controversy, in order to entitle it to pursue the vein on its dip.

VII.

ADMISSION OF IRRELEVANT TESTIMONY.

About the first thing the plaintiff proceeded to do on the trial of this case, was to offer proof of the strike and dip of what it was pleased to term its Discovery vein (Record 213, pp. 17, 20, 21, 23), to which Plaintiff in Error objected, for the reason that the same was incompetent and immaterial, there being no allegation in the complaint as to the course or direction of the discovery vein, nor any allegation that there was a discovery vein, and the admission of this evidence forms the basis of our second, third, fourth, sixth and ninth assignments

of error. It is to be remembered in this connection, that this is a common law action for the recovery of damages for an alleged trespass, and that with reference to the procedure on the trial of the cause the Code of Civil Procedure of the State of Montana governed. It is expressly declared, by section 3144 of that Code, that

"Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute."

No material facts not pleaded can be proved.

Bank v. Smith, 11 Wheat., 171; 6 L. Ed., 443.
Stout v. Coffin, 28 Cal., 67.
Murdock v. Clark, 59 Cal., 683.
Rector v. Clark, 78 N. Y., 21-28.

Was it material in the trial of this case for the plaintiff to establish the fact, that there was within the surface boundaries of its St. Louis claim, a vein, lode or ledge upon which its discovery was made, and the strike and dip of such vein? This question finds its answer in the sentence already quoted from the Walrath case.

"This proposition we affirm, with the addition that the end lines of the original *(i. e. Discovery)* vein shall be the end lines of all the veins found within the surface boundaries."

Walrath v. Champion M. Co., 171 U. S., 293-308.

And this enunciation is settled law, not only by the case in which it is found, but in every side-end-line case to be found in the books.

"The purpose of the rule which requires that the allegations and the proof must correspond, is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue."

Nash v. Towne, 5 Wall., 689-698.

Here we were not apprised of the nature of the questions the plaintiff expected to present on the trial of his case. By its complaint, we were invited into court to determine the rights as to one specific vein, and nothing whatever was said as to there being any other vein or lode, within the surface boundaries of its claim. And this variance between the allegations of its complaint, and the proof, was material and of a character to mislead us, in maintaining our defense on the merits. If the plaintiff had alleged in its complaint that its discovery vein run in a northerly and southerly direction through its claim, and that its dip was to the east, we might have denied those allegations, and, if, upon the trial, we had succeeded in showing, as we think we could have done, that its true discovery vein did not run in a northerly and southerly direction or did not dip to the east, but in some other direction, it would have been a complete defense to the case. Not being apprised of the fact, by allegations in its complaint to that effect, we were taken by surprise, and were wholly unprepared with proof to meet the issue thus unexpectedly tendered to us.

The proposition that the proof and the pleading must correspond, and that any material variance is fatal, seems so well settled that it is scarcely necessary to cite authorities, but we will refer the Court to the following,

should it find it necessary to refer to them in passing upon this question.

Boone v. Chiles, 10 Pet., 177, 209.
Rubber Co. v. Goodyear, 9 Wall., 793.
Singleton v. Scott, 11 Iowa, 594.
Boardman v. Griffin, 52 Ind., 101.
Stroup v. State, 70 Ind., 495.
Arnold v. Angell, 62 N. Y., 508.
Vrooman v. Jackson, 6 Hun, 326.

The Defendant in Error contended in the courts below, and will doubtless contend in this Court, that inasmuch as it has alleged in its complaint that it is the "owner" of the St. Louis claim, it had the right to show such ownership by any competent proof. A sufficient answer to this contention is that the plaintiff's title to the St. Louis claim is expressly admitted by the first paragraph in our answer, and no testimony to establish it was necessary.

It further contends here (see p. 12 of its brief on motions, Record 213) that having pleaded that it was the owner of the vein in question, it would be pleading evidence if it were required to plead that it had a discovery vein extending lengthwise through its claim, and that the dip of such vein was to the east. It says:

"The plaintiff contended that the simple allegation of ownership was sufficient. That was a question of the construction of a practice act of the State of Montana, nothing else. What form the complaint takes in an action of ejectment, depends entirely upon the law of the states, the United States Court simply following the state practice."

We do not think that the gentlemen on the other side, intend by this, to be understood as saying that there is any special provision in the Code of Civil Procedure of the State of Montana, or elsewhere in the statutes of that state, specially authorizing a plaintiff in an ejectment suit to simply allege ownership of the real property in controversy, in his complaint, and saying that such allegation shall be sufficient. There certainly is no such statute to be found in the laws of the state, and there never was one. By this we mean such a provision as is found in the Code of New York, whereby it is declared that it shall be sufficient for the plaintiff to aver in his declaration *(complaint)* that on some day therein to be specified, and which must be after his title accrued, he was possessed of the premises in question, describing them with convenient certainty, etc. In Montana, as already said, there is no special provision for pleadings in actions for the possession of real property, but they are to be governed by the general principles of pleading. The plaintiff may, if he elect, deraign his title, or he may allege that on a given date he was the owner of, and in possession and entitled to the possession of, the property in dispute, and it has been held in this state, following *Payne v. Treadwell*, 16 Cal., 221, and *Lick v. Diaz*, 30 Cal., 65, that a complaint in the latter form was good.

But this rule is applicable only to actions in ejectment, and is not applicable to other actions where an element in the right of recovery is the title of the plaintiff to certain real property. Of course, in trespass *quare clausum*, possession is all that is necessary to maintain an action

against a mere naked trespasser, and title to the property is not essential. But take a case, for example, where the plaintiff has replevined cattle *damage feasant*, the defendant who would justify the seizure of another's property, must plead every fact that would authorize it. He must set forth his title fully, and a bare averment of title, with possession or right of possession, is not sufficient.

3 *Chitty's Pleadings*, 1058, notes f and g and authorities there cited.

In this connection, we desire to call the attention of the Court to the fact that in New York, Wisconsin, Indiana, South Carolina, Florida, Oregon, Minnesota, and perhaps some other states, this obligation to plead title is modified by statute providing, that in an action to recover possession of property distrained doing damage, an answer that the defendant, or person, by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property. See:

Code Proc. N. Y. (10 Rev. ed.), § 166.
Rev. Stats. Wisconsin, Chap. 125, § 28.
Code Civ. Proc. Ind., § 89.
Code Proc. S. C., § 189.
Code Civ. Proc. Fla., 116.
Code Civ. Proc. Ore., § 90.
Code Civ. Pro. Minn., § 102.

There is no such provision in the statutes of Montana, and in the absence of any enactment, the common law is, by statute, declared to be the rule of decision.

In an action by an heir to enforce a forfeiture stipulated in a conveyance by an ancestor, for the non-performance of a condition subsequent, the complaint must not only show the heirship, and the fact of the conveyance and its condition, but also that the ancestor was the owner in fee at the time.

Clark v. Holton, 57 Ind., 564.

We think the reason for the rule for which we contend, is more cogent in a case like the one at bar, than it is in the cases above cited, where it is so rigidly enforced. It is admitted by the complaint, paragraph three, that our Nine Hour claim is a patented claim. The plaintiff is seeking to assert rights within the vertical boundaries of our claim. We are therefore entitled to say to him, in the language of Judge HAWLEY:

"Hands off, of any and everything, within my surface lines, extending downward vertically, until you prove you are working upon or following a vein which has its apex within your surface claim.

Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed., 540, on p. 550.

And, as we have already seen, he must show more than this. He must show that his discovery vein has extra-lateral rights in the same direction and to the same extent, which he is claiming for the additional or by-vein

which he finds within his surface boundaries. As showing the legal presumptions which attach to a patented mining claim, and the *onus probandi* which rests upon him who asserts rights within such ground, we beg to call the Court's attention to the following cases:

Reynolds v. Iron Silver M. Co., 116 U. S., 987.
Cheeseman v. Hart, 52 Fed., 98.
Duggan v. Davey, 4 Dak., 110.
Jones v. Prescott M. F. Co., 21 Nev., 339, 349.
Bell v. Skillicorn, 6 New Mex., 399.
Leadville M. Co. v. Fitzgerald, 4 Morr. Mine. Rep., 380.
Doe v. Waterloo M. Co., 54 Fed., 935.

The necessity for enforcing this rule is well illustrated by the case at bar. What purports to be a map of their St. Louis claim appears on the front page of their brief in their motion to dismiss, in case 213. The apex of what is claimed to be the discovery vein, is shown by the irregular red line, drawn across it from north to south. By reference to it, you will see that for more than two hundred feet, it runs in an almost due easterly and westerly direction, so that if it is continuous in that direction, it would cross the line which plaintiff has denominated its east side line, and that line would become, under the decisions, an end line of its claim. Now if we can show, as we feel confident we can, that plaintiff's discovery was upon the east and west vein; that it continues in substantially the same direction as shown on their plat, and does actually cross the east line of their claim; that

what they have followed to the north and south of this vein, are mere fault planes or slipping seams in the country rock, and not a vein at all, ought we not to have some reasonable opportunity of doing so? Is it our duty to import these important matters into the case for the first time by our answer, or must the plaintiff when he claims rights within our patented surface, show his right to them, not only by proof, but by appropriate pleading?

VII.

EVIDENCE IN AGGRAVATION OF DAMAGES.

Our eighth assignment of error relates to the testimony which was given by the witness John R. Parks (Record 213, p. 22) relative to the use made by the Plaintiff in Error, of the 400 foot level, shown upon plaintiff's "Exhibit A," which level had been constructed within the surface boundaries of the Nine Hour claim, conceded by the pleadings to be the property of the Plaintiff in Error, but within that portion of the lead, which the plaintiff claimed had its apex in the St. Louis claim. The court, over our objection, allowed the witness to testify to the use the Plaintiff in Error had made of the level in question.

The whole scope of plaintiff's action was for the recovery of damages for ores alleged to have been wrongfully mined by the Plaintiff in Error, from the Compromise ground, and no claim was made in the complaint for any sum whatever, for the use and occupation of the

St. Louis mining claim, or any part or portion thereof. This testimony was offered for the purpose of augmenting plaintiff's damages, and it doubtless had the desired effect, and it was in our judgment prejudical error. Evidence in aggravation of damages cannot be received in an action of trespass, unless there is an allegation of the facts sought to be proved, either as a matter of aggravation, or as a distinct ground of recovery.

Eames v. Prentice, 8 Cush., 337.
Warner v. Abbey, 112 Mass., 355.
Brown v. Lake, 29 Ohio St., 64.
McTavish v. Carroll, 13 Md., 429.

VIII.

THE JUDGMENT ROLL IN THE SPECIFIC PERFORMANCE CASE WAS INADMISSIBLE ON REBUTTAL.

For some reason, which we have never been able to fathom, the plaintiff on the trial of this case, was very anxious to have introduced in evidence, in its behalf, the judgment roll in the Specific Performance case. It first offered it in evidence in making out its case in chief, and upon the settlement of our bill of exceptions, it insisted on amending our bill so as to make it show this unimportant fact (Record 213, p. 19). The question propounded to the witness Mayger as to the circumstances under which he executed the deed to the Compromise ground (Record 213, p. 18) was for the pur-

pose of introducing this judgment roll and it was then offered in evidence. It was, however, so manifestly out of place, and the question asked of the witness, as to the circumstances under which he executed the deed, was so manifestly irrelevant and incompetent that the court sustained our objection to its introduction in evidence. In the argument with reference to its admissibility, we had suggested that if it was admissible at all, it would be in rebuttal, and accordingly it came in on rebuttal, over our objection (Record 213, p. 44). It was not claimed, at the time of its introduction, or at any other time, that it was in rebuttal of anything we had proved or offered to prove, but it was admitted to enable the court to construe the deed marked Plaintiff's Exhibit No. 2 (Record 213, pp. 45-10). The deed thus sought to be construed, was the deed made in pursuance to the judgment in the Specific Performance case, to the Plaintiff in Error, for the "Compromise ground," and needed no construction whatever. There was no controversy about its terms—no dispute between the parties as to the making or execution thereof, nor as to what was conveyed thereby, and in short there was not an ambiguous expression in it, for the court to construe. It was before the court at the beginning of the case as an Exhibit to our answer, and the court had repeatedly construed it in its rulings made upon our objections to the admission of testimony. The court had already determined, and had repeatedly determined during the progress of the trial that the words "*together with all the mineral therein contained*," found in the description of the property con-

veyed by said deed, was an absolutely meaningless expression, adding nothing to or taking nothing away from the deed.

If the original bond for a deed had not been merged in the judgment, and had been before the court as an estoppel, the court might have permitted testimony to be given, tending to show the situation of the parties and the surrounding circumstances, to ascertain, if possible, what was the intention of the parties, if there was any ambiguity, either patent or latent, upon the face of the instrument. As we have already shown in our brief on the motions to dismiss and affirm, the intention of the parties to this bond was a matter expressly in issue in the Specific Performance case, and the judgment of the State District Court was conclusive upon this subject. The intention of the parties at the date of the execution of the deed, was wholly immaterial. The plaintiff could not have had any intention in its execution which could be the subject of judicial inquiry. As shown by the defense it made in the Specific Performance case its intention was not to execute a deed at all, if it could avoid doing so. It was compelled to execute the deed by the order of the court, and it was compelled to execute the deed which was prescribed by the court and none other. There is no view of this case which would render this testimony admissible, anywhere in the case, and least of all on rebuttal. It was therefore clearly error to admit it, although we cannot claim that it was prejudicial.

IX.

THE PLAINTIFF WAS NOT ENTITLED TO RECOVER IN THIS ACTION, FOR THE ORE HELD UNDER ITS OWN INJUNCTION.

A more serious error, than the one last above referred to, is found in the fact that the court permitted the plaintiff to offer testimony concerning, and to recover for certain ores, mined in those portions of the "Compromise ground" marked on plaintiff's "Exhibit A," blocks numbered 8 and 11 (Record 213, pp. 19, 20). It appeared clearly from the testimony of Mr. Alexander Burrell, the manager of Plaintiff in Error (Record 213, p. 30), that the ore taken from these blocks, while it had been mined by his company, was being held under an injunction order issued out of the Circuit Court of the United States for the District of Montana, in an action brought by this Defendant in Error against the said company, the Plaintiff in Error herein. This was undisputed, and in fact admitted by the plaintiff. This ore was therefore *in custodia legis*, and had not been so converted to its use by the defendant, as to entitle the plaintiff to recover for it in this action. The precise thing which the plaintiff accomplished by its injunction proceedings was to prevent the conversion of the ore from blocks 8 and 11, and yet in this action a very large part of its judgment is for the conversion of ores, which the testimony shows has not been converted, but is being held at the instance of the plaintiff, and to be turned over to it, on the termination of the suit in which the

injunction issued. The court should have instructed the jury as requested by us in our third request (Record 213, pp. 45, 46), to the effect that if they found from the testimony that the defendant had not converted the ores mined from blocks 8 and 11, but had such ore ready to deliver to the said plaintiff, they should not include the same, or the value thereof in their verdict.

The Circuit Court of Appeals, in passing upon this assignment of error, says:

"Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from 'disposing of, treating and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court and had not been converted to the use of the defendant. There is nothing in the pleadings, nor in the bill of exceptions to show that such ores had been returned or tendered to the Defendant in Error, or in any way accounted for, nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account."

This ore was taken from the "Compromise ground," which we claim to own, *together with the mineral therein contained*, by the highest and best title known to the law, but, laying this aside, suppose we are trespassers, as the court found us to be. We have in our possession a certain amount of ore, which we have mined from blocks 8 and 11, which we are commanded to hold and which we are holding, under the order of the court. Can

the same plaintiff in another action recover the value of the ore, and then in the injunction suit recover the ore itself? It is a maxim of equity that when a court of equity has obtained jurisdiction of a case, it will do complete justice between the parties. If in the equitable action the complainant establishes its right to the ores held under injunction, the court can require them to be delivered to it. "The governing motive of equity," says Prof. POMEROY, "in the administration of its remedial system, is to grant full relief, and to adjust in one suit the rights and duties of all the parties, which really grow out of and are connected with the subject matter of that suit."

1 *Pomeroy's Equity Jurisprudence* (2d ed.), § 114.
Disher v. Disher, 45 Neb., 100; 63 N. W. Rep., 368.
New York, etc., R. Co. v. Schuyler, 34 N. Y., 30, 45.
Adkins v. Edwards, 83 Va., 300.

William Mayger the manager of the St. Louis Company, the Defendant in Error, testified:

"No. 8 was mined last fall. I got out an injunction and restrained them from *converting that ore to their own use*, and I think the ore is stored subject to the instructions of this court. *The court holds it*, I believe. This applies also to block 11." (Record 213, p. 24.)

The injunction order and the order modifying the injunction appears at pp. 25-27 of the record, by which it will clearly appear that in and by said order, this Plain-

tiff in Error was, at the trial of this action, enjoined and restrained from "working, mining or removing any ores, quartz rock or mineral therein contained, or disposing of, treating and reducing any ores heretofore removed or extracted from said premises." And yet, under a complaint which charges us with having *converted* to our own use mineral of the value of two hundred and fifty thousand dollars, we are held for the value of the ore which the plaintiff itself, through its General Manager says we did not convert. "I got out an injunction and restrained them from *converting that ore to their own use.*" It seems to us that this is another fatal variance between the proof and the pleading, and that it was error on the part of the court not to give the instruction we requested.

The Circuit Court of Appeals says that it was for us to show that the ores were offered to or were left in the possession of the Defendant in Error, and to have submitted evidence of their value, and it says that no evidence was offered for the purpose of definitely fixing the value of such ore. We respectfully submit that there was already evidence in the case showing as definitely as could be shown both the amount and value of the ore extracted from these two blocks.

Says the witness Keerl:

"The cubic feet in block No. 8 is 2187.9, equivalent to 168.3 tons." (Record 213, p. 19.)

And as to block No. 11, he says:

"There was 28.8 cubic feet of it equivalent to 2.2 tons. I marked this block No. 11." (Record 213, p. 20.)

The witness Parks testifies:

"I took samples from block No. 8, which average $13.28 per ton. The ore taken from near the top of the winze, block No. 11, ran sixty and eighty cents to one dollar and twenty cents per ton." (Record 213, p. 31.)

Here, we submit, was the clearest proof, with reference both as to the amount and value of the ores extracted from these two blocks of ground, and it would not have been any clearer or more satisfactory, if it had been submitted by us. We had not weighed the ore or assayed it, and if we had, the proof would not have varied very much from that offered by the plaintiff. But what particular figure does the amount or value of this ore cut, when the question is as to whether the instruction offered should or should not have been given? That simply tells the jury not to take into consideration, in fixing the amount of plaintiff's damages, the ores mined from blocks 8 and 11, for the reason that such ores had not been converted, so as to entitle the plaintiff to recover for them. The amount and value of them would be therefore immaterial, and the jury when they reached these respective blocks in their deliberations, would simply pass them by, without attempting to ascertain from the testimony what was the damage the plaintiff would be entitled to recover for ores extracted from them. We respectfully submit that the reasoning of the Honorable the Circuit Court of Appeals, on this branch of the case, is not sound and that, unless it can be shown that legal conversion takes place, without actual conversion, this judgment should be reversed.

In *Walker v. Reister*, 102 U. S., 467, 469, it was held that unless the complainant sustained both of the principal allegations of the bill—namely, that the bonds were the property of the company, and that the defendant wrongfully *converted* them to their own use—this bill was properly dismissed; so here, we say it was incumbent on the plaintiff to show that it was not only the owner of the ore in controversy, but that we had wrongfully converted it to our own use; and proof that the plaintiff had prevented such conversion by the suing out of an injunction is not proof of conversion, but of exactly the contrary.

X.

OTHER ERRONEOUS INSTRUCTIONS.

The instructions embraced in our fourteenth and fifteenth assignments of error, we think, correctly state the law on the subjects to which they respectively relate. The former points out the difference between actual and constructive possession of real estate, and enunciates the well settled rule of law that in order to recover for a trespass on real estate, the plaintiff must be in possession of the same at the date on which the action is brought.

The latter, we believe, correctly states the measure of damages, as defined by this court in numerous cases, applicable to a case of unintentional trespass, such as the facts show this case must have been. The Plaintiff in Error was mining within the surface boundaries of

its own mining claim, in ground which had been conveyed to it by the plaintiff, together with all of the mineral therein contained. It was mining, as we contend, its own ore, and even if it should be held that it was mistaken with reference to its title, the evidence shows, beyond doubt or controversy, that the Plaintiff in Error was not a willful trespasser. We submit that the true measure of damages in this case was the value of the ore as it stood in the mine, and if it would not, or if any of it would not pay the costs of extraction and reduction, then it had no value and the plaintiff was not damaged.

In connection with this refused instruction we desire to call the court's attention to instruction No. 2 given by the court, and which forms the basis of our seventeenth assignment of error. We consider this instruction as being erroneous, vicious and highly prejudicial in this case. It practically tells the jury that they may render a verdict for all of the ore taken from the several blocks of ground, mentioned in the plaintiff's testimony, based upon the value of the best grade of ore to be found in that vicinity. Proof of value of the ore extracted was made by the witness John R. Parks (Record 213, pp. 20-23). The several blocks were all in the same vicinity—all in the Compromise ground, except a small part of No. 11, and the values ranged from $165.10 per ton for ore taken from block 9, down to sixty cents, eighty cents and one dollar per ton, for the ore taken from block No. 11, which was so low in value that the witness said he did not compute it. (Record 213, p. 21.)

Although, perhaps, a little digression, but as germane

to the applicability of this instruction to the testimony, we beg to call the Court's special attention to the evidence with reference to block No. 10. The value of the ore taken from this block is given at $127.14 per ton or a total of $18,626.01 (Record 213, p. 21):

"I determined the value of the ore in that stope from the nearest adjoining ground where we could get the ore."

And on pages 22 and 23 he tells where that was:

"The nearest available point is one hundred feet up the winze, where the ore is exposed. It is within that, probably eighty-five or ninety feet, I think I took the ore out through the lagging. I took about 8 pounds for this sample. It went $127.14. The winze, at the point where the sample was taken from, was from high grade ore. It carried 6.4 ounces in gold, and 4.8 ounces in silver. I took no samples from the north end of block 10, nor from any point immediately above it. The sample was taken about eighty feet above and above the middle or southern portion. I did not examine the level to see if I could find any ore, because that would have taken too much time. I could not get at the ore as well below as I could above. I could not get at what I believed was the ore body, the rich ore that had been taken out, and I wanted to get at the nearest thing to approximate to that ore. I saw some ore in the northern portion of the east side of the level in block 10, when I was there. I don't know the quantity. It was an irregular mass in the eastern portion of the one hundred and ninety foot level. There were three or four feet of it in height and a foot or two in width the whole length. The level was in low grade ore for eleven feet. The ore had been removed, though—the good ore had been removed and taken out, but I took no samples of it."

The history of block No. 10 is given by Mr. Burrell,

Manager of the Plaintiff in Error. (Record 213, p. 30.) He says:

"Block 10 was driven by us at the time the St. Louis Company sunk its winze from the forty-six foot level. We could hear them working from the stope, and, not knowing what their intentions were, we started this level out to intercept them. The work of driving this level was stopped on the thirtieth day of August, 1893. The level, as driven in what is called Block No. 10 was of regular size,—six and a half or probably seven feet and a half by five or six feet in width. I saw the material that came out of there every day. It had *no mineral value*, and was *not worked in the mill.* It was put into the level just south of our main Nine Hour shaft. I never saw a particle of copper stain in it. The ore in the Drum Lummon mine trends to the south, starting at the top and going at right angles to the dip, the ore would decrease in value as you go deep. I have heard the testimony of Mr. Parks about taking a sample in the winze, one hundred feet above block 10. A sample taken out of that point would not represent the value of the ore taken out of the level by any means, You might as well go across the range and get a piece of ore as to go there. The material that is in the level now is similar to that taken out, and you can get from block 10 an average of what was taken out. The back of the level should be a better grade really than the entire material taken from the drift, because the top is nearer the bottom of the southern trend, than the bottom of the drift corresponding to its height."

The next witness, Mr. Philpotts, testifies to having taken samples from block 10, and their assay value. He took six samples the assay of which showed values ranging from 30 cents per ton to $3.44 per ton, too low to work by any available process.

And yet the jury are instructed as a matter of law, that they "are at liberty to consider the highest value of ore found in the vicinity of that ore." It is not the "nearest available point," as it is put by the witness Parks, but anywhere in the vicinity. Under this instruction the jury might have adopted as the measure of value for the ore removed, the highest value of any ore contained in the Compromise ground, and they were not required to find from the testimony the actual value of the ore removed. Ought any verdict to stand in a court of justice, which is based on this sort of evidence, and such an instruction as this?

But, perhaps, the most serious objection we have to urge against the instructions given by the court to the jury, is to the instruction numbered one. That instruction is as follows:

"No. 1. The evidence in this case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east, and that there is another vein having a section of its apex wholly within the St. Louis claim between the planes known as 520 and 108."

Our first objection to this instruction is that it goes outside the issues made by the pleadings. There was no issue whatever made by the pleadings as to the discovery vein of the St. Louis, or as to its strike or dip. These things were not in issue, and we believe it is true, in fact a cardinal rule governing the giving of instructions, that they *must be confined* to the issues in the case, and must not go beyond them.

Proffat on Jury Trials, § 318.
Terry v. Shively, 64 Ind., 106.
Glass v. Gilvin, 64 Ind., 106.
Capital Bank v. Armstrong, 62 Mo., 59.

"The court does not possess the power to change by instruction the issues which the pleadings present."

Frederick v. Kinzer, 17 Neb., 366.

In Oregon it is held that an instruction which directs the attention of the jury to a fact not in issue, and making their finding another fact decisive, is erroneous, although the fact under proper issues, might be material or decisive of the rights of the parties.

Marx v. Schwartz, 12 Pac. Rep., 253.

Our next objection to it is, that it is not an instruction as to the law of the case, but is the clearest sort of an invasion of the province of the jury, and a judicial finding of three facts, one of which is in issue, and two of which are not. If it had been in issue, it would have been for the jury to find whether the St. Louis discovery vein extended substantially from one end to the other lengthwise of the claim; whether it dipped to the east, and whether there was another vein having a section of its apex wholly within the St. Louis claim between the planes known as the 520 and 108. And here we pause for a moment to point out the fact that the court's finding, in this regard, seems broader than the allegation of the complaint. In paragraph IV of the complaint it

is alleged: "That the dip of one of the veins having a *portion of its top or apex* inside the surface location," etc. while the court finds that the same vein has a section of its apex wholly within the St. Louis claim. However, this is not very material. What we wish to call to the attention of the court is the obvious fact, that there is in this so-called instruction no reference to any principle of law whatever, but that it is purely and only a finding of fact. In saying this we are not overlooking the fact that in the Federal courts the judge, in charging the jury, may comment upon the evidence, and the facts which seem to him proven or not proven, but in the Federal courts no less than in the State courts, is the court prohibited from invading the province of the jury, and himself finding the facts. This so-called instruction does not purport to be a comment upon the evidence or the facts in the case, such as a judge might properly make, but if it was it would have been the duty of the court to caution the jury that it is their province to find the facts, and that they are not to be governed by his opinion, if in their judgment the evidence does not justify it.

McLanahan v. United States, 1 Pet., 170.
Lovejoy v. United States, 128 U. S., 171.
Rucker v. Wheeler, 127 U. S., 84.
Chesapeake Canal Co. v. Knapp, 9 Pet., 541.
United States v. Phila., etc., R. Co., 123 U. S., 113, 114.
St. Louis, etc., Co. v. Vickers, 122 U. S., 360.

In *Chesapeake, etc., Canal Co. v. Knapp, supra*, it is distinctly held that a judge should not give such instructions as to supersede an inquiry into the facts, and every case cited above, together with other cases, which we do not deem it necessary to cite, show conclusively that such a bald finding of fact, as the one here under discussion, cannot possibly be upheld.

XI.

CONCLUSION.

We do not deem it profitable to discuss these questions at greater length than we have done in the foregoing brief. It seems to us that each one of our assignments, discloses such a palpable error, as to require but very little from us beyond the bare statement of the proposition. Take, for example, the one last above referred to. It has been a legal maxim almost time out of mind, that *ad questionem facti non respondent judices*, and there is little more need of citing authorities to sustain a legal maxim, than there is of making an actual demonstration to establish an axiom in mathematics.

All of the questions discussed in this brief, are, however, of secondary importance to those discussed in our brief on the motions to dismiss and affirm. As the case is presented by the pleadings we do not see how it can be held that the plaintiff is entitled to extra-lateral rights on the Drum Lummon lode, entering and departing, as it is alleged to do, through the same boundary line of the St. Louis claim, and it not appearing that there is any other lode within the surface boundaries of that claim.

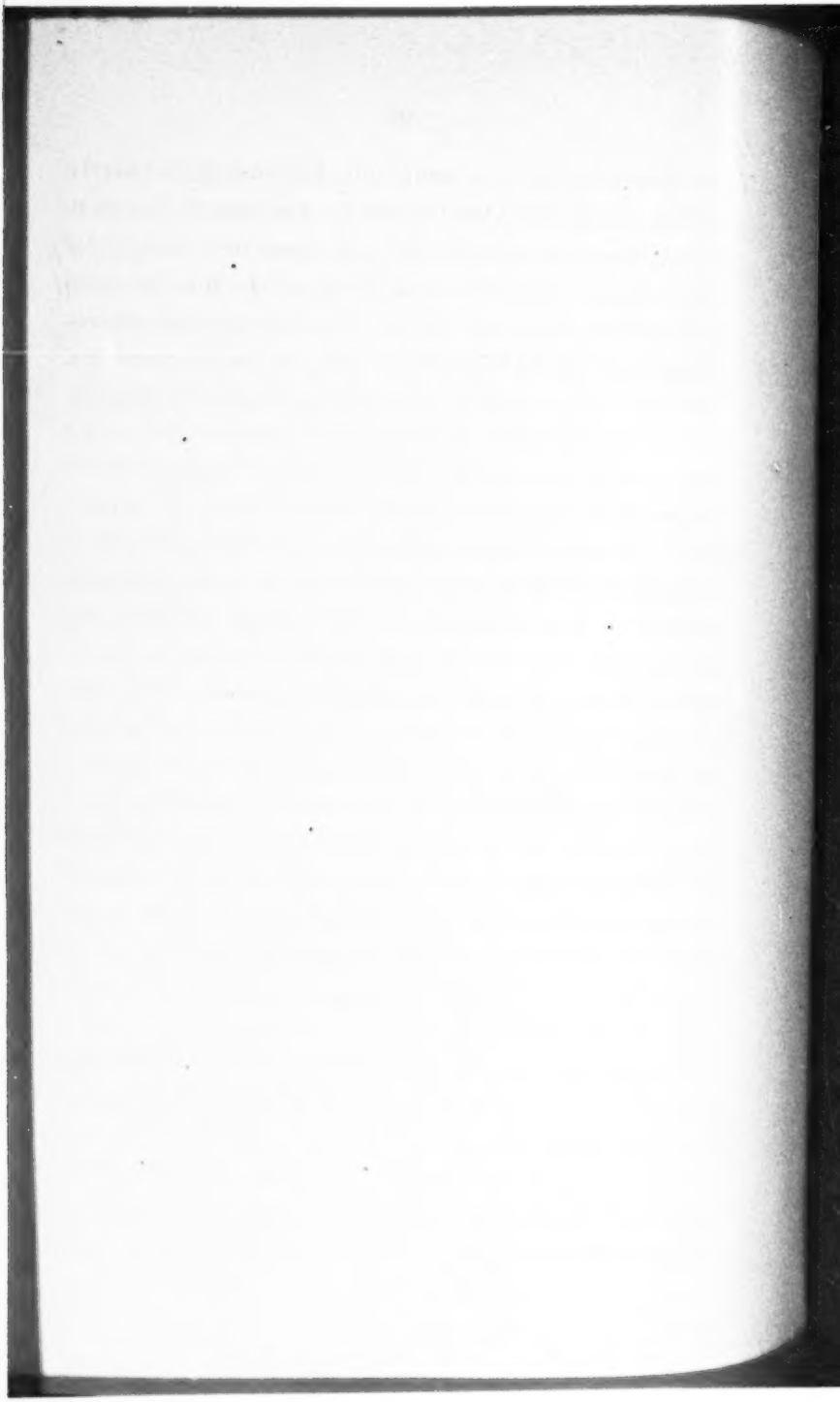
As presented by the complaint, the case falls exactly within the doctrine established by the case of *Catron v. Old*, cited in our former brief. It seems to us that under the decisions of this Court, when a side line becomes an end line, by reason of the fact that the lode crosses it on its strike, it becomes an end line for all purposes, and cuts off pursuit of the vein in all directions.

Should the Court, however, be of opinion that such a vein would be entitled to extra-lateral rights, then we respectfully submit that in the case at bar the judgment in the Specific Performance case, and the deed made in pursuance thereof and as a part of such judgment, must be held to be an estoppel, and if projected end lines parallel to the end lines of the St. Louis claim are to be drawn down through our claim anywhere, they must be drawn down, one through the point where the apex of the lead enters the St. Louis claim, at a point 520 feet southerly from the northeast corner of the claim, and the other through the point of intersection of the westerly boundary line of the Compromise ground with the so-called easterly side line of the St. Louis claim, between corners numbered one and two thereof.

Respectfully submitted,

CHAS. J. HUGHES, JR.,
EDWARD C. DAY,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

ALDIS B. BROWN,
ALEX. BRITTON,
of Counsel.



IN THE

Supreme Court of the United States

THE MONTANA MINING COMPANY, Limited, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY, of Montana, Defendant in Error. } No. 213.

THE MONTANA MINING COMPANY, Limited, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY, of Montana, Defendant in Error. } No. 214.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

While we do not deem it necessary to reply at any great length to the labored and voluminous brief filed in behalf of the defendant in error, there are a few observations which we may properly make with reference to it. In the first place the most casual reader of this brief will notice that from the beginning to the end of it there is a persistent effort made to find some vulnerable point of attack of our position, and failing in this to draw the attention of